85-301

No. 85-

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

—o—

AMEY, INC., and JOHN C. AMIS, JR.,
Petitioners,

v.

GULF ABSTRACT & TITLE, INC., a Florida Corporation; HENDERSON, FRANKLIN, STARNES & HOLT, P.A., a Florida Professional corporation; LEE COUNTY BANK, a Florida Banking corporation; EXCHANGE BANK, a Florida Banking corporation; ALLEN, KNUDSON & SCHWARTZ, a Florida Partnership; BARNETT BANK, a Florida Banking corporation; GOLDBERG, RUBENSTEIN AND BUCKLEY, P.A., a Florida Professional corporation; FIRST NATIONAL BANK, a Banking corporation; and ALDERMAN & TAMINOSIAN, P.A., a Florida Professional corporation,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

The court of appeals held in this Sherman Act consumer antitrust case challenging a joint venture and its participants that plaintiffs had not produced "significant probative evidence" of horizontal concerted action to avoid summary judgment. The court's rationale was that, under an Eleventh Circuit rule corresponding to the theory advanced by petitioners in *Matsushita Electrical Industrial Co., Ltd., et al. v. Zenith Radio Corporation, et al.*, No. 83-2004, *cert. granted*, 105 S. Ct. 1863 (1985), there can be no inference to submit to a jury regarding concerted price-fixing unless the alleged conspirators have "acted against their economic self-interest," so that the possibility of unilateral action has been excluded. The court applied such a requirement in this case, affirming summary judgment for respondents, despite the fact that the district court had allowed petitioners no document or interrogatory discovery whatsoever. The questions presented are:

1. Whether, at the summary judgment stage of a price-fixing case, an inference of concerted action may be permitted despite the fact that there is no contention or evidence that the defendants have acted "against their economic self-interest," so that the record has not excluded the possibility of parallel independent conduct.

2. Whether competitors who combine to create, own, and operate a directly competitive joint venture are deemed, as a matter of law, to have formed a "combination" for Sherman Act purposes.

3. Whether the propriety of summary judgment in a Sherman Act case, under Rule 56, F.R. Civ. P., depends upon and must be considered together with the nature of and opportunity for pre-trial discovery allowed to the party opposing summary judgment.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

CONCLUSION 30

APPENDIX A

United States Court of Appeals for the Eleventh Circuit, Opinion ..... App. 1

APPENDIX B

United States District Court Middle District of Florida, Opinion and Order ..... App. 51

APPENDIX C

United States Court of Appeals for the Eleventh Circuit, Judgment ..... App. 71

APPENDIX D

United States Court of Appeals for the Eleventh Circuit, Petition for Rehearing Denied ..... App. 73

APPENDIX E

United States District Court Middle District of Florida, July 17, 1981 Order Granting Petitioners' Counsel Leave of Absence and Ordering Responses to Interrogatories ..... App. 75

APPENDIX F

United States District Court Middle District of Florida, June 25, 1982 Order Refusing to Compel Discovery and Staying Discovery ..... App. 77

TABLE OF AUTHORITIES

CASES:

Pages

Adickes v. Kress & Co., 398 U.S. 144 (1969) 18, 29

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 14, 15

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 105 S. Ct. 2847 (1985) 18

Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978) 16

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 23

C-O Two Fire Equipment Co. v. United States, 197 F.2d 489 (9th Cir.), Cert. den. 344 U.S. 892 (1952) 17

Catrett v. Johns-Manville Corp., 756 F.2d 181 (D.C. Cir. 1985) 29

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 18, 19

Data General Corp. v. Digidyne Corp., et al., 105 S. Ct. 3535 (1985) 29

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 16, 25

Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469 (3rd Cir. 1985) 19, 20

Gary Plastic Packaging v. Merrill, Lynch, 756 F. 2d 230 (2nd Cir. 1985) 28

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 3, 4, 6, 24

In Re Japanese Electronic Products, 723 F.2d 238 (3rd Cir.), Cert. granted, 105 S. Ct. 1863 ..... 10, 19, 27

Jefferson Parish Hospital v. Hyde, 104 S. Ct. 1551 (1984) 6, 9, 29

TABLE OF AUTHORITIES—Continued

Pages

Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corporation, et al., No. 83-2004, Cert. granted, 105 S. Ct. 1863 (1985) 10, 11, 12, 19, 22

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth 105 S. Ct. 3346 (1985) 15

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) 18, 19

Moore v. Boating Industry Associations, 754 F. 2d 698 (7th Cir. 1985) 21, 24

N.C.A.A. v. Board of Regents of the University of Oklahoma, et al., 104 S. Ct. 2948 (1984) 23, 29

Norfolk Monument Co. v. Woodlawn Memorial Gardens, 394 U.S. 700 (1969) 13, 15, 22

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co., 105 S. Ct. 2613 (1985) 23

Pan-Islamic Trade Corp. v. Exxon Corp., 632 F. 2d 539 (5th Cir. 1980) 16

Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985) 18, 21

Paul Kadair, Inc. v. Sony Corp. of America, 694 F.2d 1017 (5th Cir. 1983) 16

Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) 7, 13, 15, 26

Powers v. Nassau Development Corp., 753 F.2d 457 (5th Cir. 1985) 21

Reiter v. Sonotone, 442 U.S. 330 (1979) 12

Southway Theatres, Inc. v. Georgia Theatre Co., 672 F.2d 485 (11th Cir. 1982) 16

Terry's Floor Fashions v. Burlington Industries, 763 F.2d 604 (4th Cir. 1985) 20

TABLE OF AUTHORITIES—Continued

	Pages
Tunis Bros. Co., Inc. v. Ford Motor Co., 763 F.2d 1482 (3rd Cir. 1985)	19, 20
United States v. Sealy, Inc., 388 U.S. 350 (1967)	24
STATUTES:	
F.R. Civ. Pro. 26(b) (1)	26
F.R. Civ. Pro. 38(a)	18
F.R. Civ. Pro. 56(c)	2, 18, 25
F.R. Civ. Pro. 56(f)	2, 25, 26
Sherman Act, 15 U.S.C. 1 (1976)	2
National Cooperative Research Act of 1984, P.L. 98-462	23
MISCELLANEOUS:	
R. Posner, Economic Analysis of Law, 2d Ed. 1977	17
L. Sullivan, Handbook of the Law of Antitrust (1977)	17
Antitrust Advisor, 2d Ed., McGraw-Hill Book Co.	27
J. Paul McGrath, remarks, CCH Trade Reg. Report No. 675 (Nov. 5, 1984)	23
Brief for the United States as Amicus Curiae in N.C.A.A. v. Board of Regents, No. 83-271	23, 29
Note, "Conscious Parallelism and Price-Fixing: Defining the Boundary," 52 U. Chi. L. Rev. 508 (1985)	10, 11

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 758 F.2d 1486. The opinion of the district court (App. B, *infra*) is reported at 564 F. Supp. 1121.

JURISDICTION

The Judgment of the court of appeals (App. C, *infra*) was entered on April 29, 1985. The court of appeals' order

denying a petition for rehearing and suggestion of rehearing en banc (App. D, *infra*) was entered on May 30, 1985. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1 (1976), provides in relevant part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

Rule 56(c), F.R. Civ. Pro., 28 U.S.C.F.R. Civ. Pro. 56(c), provides in relevant part: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Rule 56(f), F.R. Civ. Pro., 28 U.S.C. Civ. Pro. 56(f), provides: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

STATEMENT

1. Members of the four respondent law firms and other real estate attorneys in Lee County, Florida incorporated the lead respondent, Gulf Abstract, in 1956 (564 F. Supp. 1130). Gulf Abstract has been, from its inception, a joint venture among Lee County attorneys. Stock ownership has been limited to members of the Florida and Lee County Bars, including the respondent law firms, who

comprise its Board of Directors and officers and share its profits. Gulf Abstract has granted discounts for its services to its members. (Terry, deposition, pp. 336-337, 354-355, 361; Hendry deposition, pp. 24, 29; Green deposition, pp. 27, 43, 88-89).

Gulf Abstract originally was designed only to provide real estate title abstracts for respondents upon which they would base their legal opinions regarding real estate titles, to meet the competition then provided by title insurance companies (564 F. Supp. 1130). For the purposes of assuring good title to real estate, title insurance is regarded as the functional equivalent of and thus competitive with legal opinions provided by attorneys (deposition of Warfield, pp. 182-185). The organized Florida Bar took action in the 1960's and 1970's to partially restrict and disable that competition by defining real estate title work as the "practice of law" (564 F. Supp. 1130).

Moreover, until 1975, Florida state and local bar associations required adherence to mandatory minimum fee schedules for real estate legal fees, similar to the Virginia practice condemned by this Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (pp. 261-262 Terry deposition; pp. 41-42 Smalley deposition). In 1973, while *Goldfarb* was pending in the lower courts, the respondent law firms caused Gulf Abstract to enter the real estate title insurance market; thus respondent law firms effectively began to compete directly with Gulf Abstract in the service of assuring good title to real estate (564 F. Supp. 1130).

Thereafter, Gulf Abstract circulated among respondent law firms and banks printed fee schedules setting forth insurance premiums for title insurance. At the same time, respondent Henderson, Franklin and other law firms similarly circulated their own fee schedules for real estate title work. The fee schedules of Gulf Abstract and the law firms included parallel formulae for determining the legal fee or title insurance premium to be charged a mort-

gage customer based upon a percentage of the mortgage amount, regardless of the complexity of the title search, uncertainty of the title, or time expended (564 F. Supp. 1129; Green deposition, p. 42; Smalley deposition, pp. 23-24, 33). Attorney T. Rankin Terry, an unnamed co-conspirator, has admitted that he consciously conformed his real estate legal fees to Gulf Abstract's insurance premium schedule, but denied that he did so pursuant to an agreement (Terry deposition, pp. 19-21). See also, plaintiff's exhibits 6, 8 to Doerr deposition and Doerr deposition, pp. 19-21.

The result was, after the *Goldfarb* decision in 1975 caused the bar association to eliminate its mandatory fee schedule practice, that the respondent law firms and Gulf Abstract, which they combined to operate, knowingly used the same formula for determining their legal fees or insurance premiums, resulting in approximately the same inflated fees or premiums, charged to the respondent banks' mortgage customers. Such a consciously parallel practice was enforced by the respectively "paired" banks, regardless of whether the real estate title was being assured through payment of a title insurance premium or payment for an attorney's opinion (Warfield deposition, pp. 95-96; Terry deposition, pp. 23, 118, 218-222; Caldwell deposition, pp. 104-106, 138-39, 99-100; Doerr deposition, pp. 28-67, 153-158).

At times relevant to this litigation, the four bank respondents were the dominant commercial banks in Lee County, controlling at least 75% of the commercial loan market. Each of the banks had an exclusive bilateral agreement with one of the respective four law firm respondents for the provision of general legal services, as well as real estate title work, thus precluding other Lee County attorneys from competing for that real estate title work (affidavit of Judge Rose, R: 810-812).

The fees of each of the four law firms remained parallel with each other after 1975, as did the fee formulae

circulated to the banks (564 F. Supp. 1129); (Terry deposition, pp. 420-421); (Doerr deposition, pp. 126, 105-107; Caldwell deposition, pp. 111-112, 104-106; Smalley deposition, pp. 18-19). The respondent banks and law firms also had established interlocking business and corporate relationships, with the banks extending loans to the respective law firms, and members of the firms serving as directors for the respective banks (Alderman deposition, pp. 17-20, 28-30, 55; Goldberg deposition, pp. 216, 30, 31; Edwards deposition, pp. 9, 11-12; Doerr deposition, p. 137).

2. In October, 1976, petitioner Amey requested from respondent Lee County Bank ("Lee") a mortgage loan in the amount of $60,000.00 to purchase real property located in Lee County, Florida. Lee conditioned its agreement with Amey to sell the above mortgage financing upon Amey's agreement to pay $325 for a real estate title search and opinion to be provided by the respondent, Henderson, Franklin, Starnes and Holt ("Henderson"), when and as billed by Lee at the closing. The $325 price was determined by Lee's employees by reference to the pre-printed fee schedule circulated by Henderson and was unrelated to the services actually to be performed or time to be expended. The fee was parallel to that which would have been charged for title insurance by Gulf Abstract but greater than that which would have been charged by other Lee County attorneys. Lee's selection of Henderson was based upon the pre-existing bilateral exclusive dealing relationship between Lee and Henderson, as indicated in its pre-printed forms (Exhibit 1 to Doerr deposition; Terry deposition, pp. 36, 82-83, 101-102). On November 23, 1976, a closing of the above real estate and mortgage financing transaction was held at the Lee County Bank. At the closing, plaintiff Amey paid the respondent Lee the amount of $325 for Henderson's services in "examining" title to the real property, 564 F. Supp. 1124. Amey alleged that he would have purchased the services of another lawyer or

title insurance in the absence of Lee's relationship with Henderson (plaintiffs' verified complaint, pp. 10-11).

3. Petitioners' antitrust complaint alleged, in summary, relying upon *Goldfarb, supra,* that respondent banks, law firms, and title company created and facilitated a price-fixing cartel for the provision of real estate legal services. Essentially, the law firm respondents combined to form Gulf Abstract as a joint venture and, as the Florida Bar's formal price-fixing requirements were being challenged and then eliminated, combined to cause Gulf Abstract to enter the title insurance market, circulate its premium schedule, and then use Gulf Abstract's schedule as a vehicle or "lodestar" for continuing their price maintenance activities. If cartel maintenance was not specifically intended, it necessarily was a foreseeable effect of respondents' joint venture conduct.

As a separate matter, the complaint alleged, relying upon arguments adopted in *Jefferson Parish Hospital v. Hyde,* 104 S. Ct. 1551 (1984), that the four bank-law firm combinations, together controlling in excess of 75% of their respective sub-markets as of 1976, respectively constituted illegal exclusive dealing arrangements (Count Four), and the tri-partite bank-law firm-mortgage consumer combinations respectively constituted illegal tying arrangements (Count Five).

Petitioners submitted preliminary written interrogatories to the respondents and began to depose their employees soon after the complaint was filed on November 20, 1980. When respondents refused to provide any substantive answers to the interrogatories, petitioners moved to compel answers and requested production of documents, 758 F.2d 1505. On July 17, 1981, the district court granted petitioner's counsel a leave of absence and held the pretrial proceedings in abeyance, unopposed by respondents, because petitioner's trial counsel had been seriously injured in an airplane crash. In the same order, the court

directed respondents to answer the petitioner's interrogatories (Pet. App. E). Petitioners subsequently were forced to seek and obtain a substitute counsel, who did not normally practice law in the Lee County area.

On May 6, 1982, petitioner's substituted counsel moved for an extension of discovery time and renewed the motion to compel answers to preliminary interrogatories and production of documents. As of that date, although petitioners had deposed a number of hostile witnesses, respondents still had refused to answer a single interrogatory or provide a single document (except for copies of respondents' parallel price and premium lists requested during depositions). That situation remained unchanged throughout this case.

On June 9, 1982, petitioners filed a second motion to compel answers to interrogatories and production of documents. On June 25, 1982, 19 months after the complaint was filed, the district court denied petitioners' motions to compel and stayed further discovery (Pet. App. F). On April 25, 1983, the district court entered an order granting summary judgment for all nine defendants on each of the 12 counts.

4. In relevant part, the district court held that it earlier had granted defendant's motion to stay discovery and declined to compel discovery, notwithstanding the absence of any document or interrogatory discovery, because "plaintiffs completely failed to specify what relevant evidence was likely to be revealed," 564 F. Supp. 1126, after respondents had conceded the existence of parallel pricing and parallel pricing behavior. The court distinguished this case from *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), with respect to the need for discovery and the propriety of summary judgment, on the ground that whereas issues of motive and intent regarding a conspiracy were in conflict in *Poller*, this case turned on "more objectively determinable issues, such as whether a con-

spiracy existed in the first instance," 564 F. Supp. 1126. See also, Pet. App. F.

At the time of summary judgment, the limited discovery had revealed the background of the creation and continued operation of Gulf Abstract as a joint venture by a combination among respondents; Gulf Abstract's circulation of price lists for competitive title insurance; the circulation of parallel price lists with parallel price formulae for attorneys' fees by respondents; the Florida bar's previous requirement of adherence to minimum fee schedules for real estate title work; the exclusive bank-law firm relationships; the parallel lending policies among the banks; and the anticompetitive effect these arrangements had upon other real estate attorneys in Lee County (see, *infra*, affidavit of Judge Rose).

Nevertheless, the court applied a burden-shifting rule, developed by the fifth and eleventh circuits, to require the plaintiffs, opposing summary judgment, to demonstrate by "significant probative evidence" the existence of concerted action. The court held that the evidentiary acts cited by plaintiff, in addition to consciously parallel pricing, were not "significant probative evidence" of a conspiracy and had not excluded the possibility of parallel unilateral conduct, 564 F. Supp. 1128-30.

Of particular note, the court rejected plaintiffs' primary theory out of hand: "Schedules of premiums charged by one or several title insurance companies doing business in the area are simply unrelated to the question whether the fees charged by area attorneys for rendering title opinions were fixed according to horizontal agreement, for nothing in the record suggests that title attorneys in the area conspired to fix their legal fees on the basis of these schedules of title insurance premiums," 564 F. Supp. 1128. Later in the opinion, however, the court recognized that respondent attorneys had the opportunity to conspire when they "incorporated Gulf Abstract in

1956;" such fact "gives pause, but on reflection bears no weight in this analysis," 564 F. Supp. 1130: " . . . this court is at a loss to imagine how the formation or continued operation of Gulf Abstract implicates it and the other defendants in a conspiracy . . ." 564 F. Supp. 1128.

The court also granted summary judgment on counts 3, 4, 5, and 9, alleging Sherman Act tying, exclusive dealing, and attempt-to-monopolize claims, on the ground that no valid cause of action was stated by those counts, 564 F. Supp. 1127, even though respondents had stipulated to the existence of exclusive vertical agreements and had not introduced any evidence to contradict allegations of their market power, the anticompetitive effect of their conduct, and the exclusion of competition.

5. The court of appeals affirmed the grant of summary judgment. In relevant part, the court concluded that, notwithstanding the holding in *Jefferson Parish Hospital v. Hyde,* 104 S. Ct. 1551 (1984), a real estate mortgage and real estate legal services are not two separate services, so that there could be no legally cognizable Sherman Act tying claim, rule of reason or otherwise, 758 F.2d at 1503. The court also held that petitioners had not submitted sufficient evidence of the anticompetitive effect of the exclusive dealing agreement to avoid summary judgment, *id.*

Of particular relevance to this petition, the court affirmed that petitioners' evidence regarding the existence of a horizontal combination was insufficient to avoid summary judgment. Implicitly recognizing that respondent law firms and title company had stipulated that their fee schedules, premium schedules, and fee formulae were parallel, the court held that petitioners had failed to prove the requisite kind of "plus factor" to constitute "significant probative evidence" of a combination: that respondents have "acted against their economic self-interest," 758 F.2d 1505, so that the possibility of independent action has been excluded.

The court rejected petitioners' main theory—that respondent law firms combined to organize and operate lead respondent Gulf Abstract, and combined to circulate Gulf Abstract's fee schedule among themselves, as a replacement for the state bar's price-fixing regime, so that there was direct evidence of a combination to accompany the circumstantial evidence, *id.*, at 1504-05.

The court, finally, affirmed the district court's decision not to compel discovery and to stay further discovery, although it did not address this issue in the context of its affirmance of the grant of summary judgment, *id.* at 1505-06. Of particular note, the court held that petitioners were correctly denied document discovery to reveal the identities of material witnesses and their correspondence relevant to the existence of a combination because such evidence would have been "cumulative" to the stipulations of parallel pricing but not sufficiently probative of the existence of a combination or of anticompetitive effects or motive, *id.* at 1506.

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REASONS FOR GRANTING THE PETITION

This court already has agreed to resolve, this term, the first issue raised in this petition: whether at the summary judgment stage of a Sherman Act case, horizontal concerted action may be inferred—and the issue allowed to go to trial—where the pre-trial record does not exclude the possibility of independent parallel conduct. See, *In Re Japanese Electronic Products,* 723 F.2d 238, 304-305 (3rd Cir. 1983), *Cert. granted sub. nom, Matsushita Electrical Industrial Co., Ltd. et al. v. Zenith Radio Corporation, et al.,* No. 83-2004, 105 S. Ct. 1863 (1985).

Thus this court has determined that the first issue sought to be raised in the instant case is important. The conflict among recent lower court decisions indicates that such a determination was correct. See, Note, "Conscious

Parallelism and Price-Fixing: Defining the Boundary," 52 U. Chi. L. Rev. 508 (1985).

In *Matsushita,* the issue will be resolved in the context of an international battle among industrial giants, with foreign policy concerns included for good measure. It is conceivable that this court's resolution of the pervasive and important Sherman Act problem in such a context may not provide enlightening precedent for the antitrust bar and lower courts, in view of a potential deference to the promotion of international comity which may affect the decision, CF. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 105 S. Ct. 3346, 3360 (1985).

The instant case provides an appropriate vehicle to distinguish and further explicate the concerted action issue in *Matsushita;* it presents a more typical Sherman Act setting with more clearly delineated facts, as well as court of appeals holdings, applying pervasive eleventh circuit rules, which are diametrically opposed to and conflict with decisions of the third and seventh circuits and this court.

This court should grant this petition and adjudicate this case alongside *Matsushita,* perhaps reaching a different conclusion concerning the propriety of summary judgment on the issue of concerted action, for four reasons: (i) the plaintiff in this case is an individual consumer, rather than an unsuccessful competitor, who was undeniably damaged by his participation in a non-competitive market, thus presenting a more appropriate context for antitrust enforcement: yet, contrary to the intent of Congress, the court of appeal's decision authorizes discriminatory treatment of petitioner exactly because he is an individual consumer; (ii) the court of appeals applied a recurring, economically irrational version of the rule sought to be invoked by petitioners in *Matsushita* which is the focus of a continuing conflict among and within the circuits: there can be no inference of concerted action unless defendants acted against their economic self-interest

(in allegedly creating a cartel), so that the possibility of independent conduct has been excluded; (iii) the lead respondent in this case is a joint venture, constituting a "combination" as a matter of law; joint ventures have been encouraged recently by Congress and the Executive branch, but their anticompetitive potential—at least their status as combinations—should be underscored; (iv) the curtailment of pre-trial discovery, also claimed by plaintiffs in *Matsushita*, was much more dramatic in the instant case, was based upon a revisionist reading of the Federal Rules of Civil Procedure not countenanced by this court's decisions, and directly interfered with plaintiffs' right to the requested jury trial and to the development of "rule of reason" precedent.

In short, this petition presents issues which this court already has recognized as sufficiently important to review, presenting conflicts between and among the eleventh, fifth, fourth, third and seventh circuits, in a more appropriate and useful context for the establishment of precedent.

1. In contrast to the dispute in *Matsushita*, plaintiffs in this case are not disappointed and unsuccessful international competitors. Plaintiff Amis is an individual consumer, representing the paradigm example of a party the antitrust laws were designed by Congress to protect as "consumer welfare" prescriptions. *Reiter v. Sonotone*, 442 U.S. 330 (1979).

And yet, as the court of appeal's conclusion demonstrates, petitioner was effectively discriminated against by the lower courts, denied equal access to the judicial process, including basic discovery procedures and trial by jury, because he is an individual consumer battling entrenched and historically protected[1] participants in a con-

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[1]For example, the district court judge and author of the court of appeals opinion in this case are members of the Florida Bar which, implicitly, is an unnamed co-conspirator in the case in view of its prior support for minimum fee schedule adherence and other price stabilizing practices.

certed market: "This case presents the model of a single consumer in a large market striving to substantiate its belief that it has been the victim of illegal, anticompetitive conduct . . . Amey's inability to demonstrate existence of a genuine issue of fact does not suggest that its claims were frivolous but demonstrates the almost inherent inability of a single consumer, only having access to information to which consumers are usually given access, to litigate an antitrust claim effectively," 758 F.2d at 1510.

If this court reaffirms its conclusion that the Sherman Act is a consumer welfare prescription, it must seriously review the implicit holding of the court of appeals: that a single consumer is inherently unable to litigate an antitrust claim effectively because he will never be allowed sufficient discovery, and inferences will be resolved against him. The court's conclusion is a backhanded endorsement of this court's often-quoted ruling that summary judgment in a Sherman Act case "should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot," *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962); see also, *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704 (1969).

Poller and *Norfolk Monument* represent long-standing precedent—a rule of law—governing the disposition of summary judgment motions contesting the existence of a combination in Sherman Act cases. Simply stated, the rule is that if there is any reasonable inference from the pre-trial record,[2] viewed in the light most favorable to the

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[2]In relevant part, the pretrial record includes, in addition to the stipulations of consciously parallel pricing, the affidavit of retired Judge Lamar Rose, which alone should have been sufficient to allow a reasonable inference of concerted, anticompetitive activities among the respondents:

BEFORE ME, the undersigned authority, personally appeared WILLIAM LAMAR ROSE, who, after first being duly sworn under oath, deposes and says:

(Continued on following page)

plaintiff, supporting a subsequent finding at trial of "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," *Amer-*

(Continued from previous page)

1. I have been a life'ong resident of Lee County, Florida engaged in the general practice of law for over 40 years in Ft. Myers and the surrounding counties. I have also served the people of Lee County as a Circuit Judge for 7 years. During my practice before becoming a Circuit Judge, I concluded many real estate closings from 1933 through 1969 and since my retirement as a Circuit Judge and the resumption of my law practice in 1977, I have continued to handle real estate sales and closings on behalf of the purchaser-borrower . . . As a matter of fact, in the past 15 years, Ft. Myers and Lee County have quadrupled in population and the vast majority of these new people are from out-of-state and come to this area to live and therefore, are looking to buy either a home of business or both

2. For the past 10 years or at least after Lee County Bank, Barnett Bank, First National Bank, Exchange Bank and Gulf Abstract & Title Company as well as the defendant/law firms in the above-noted cause, all became involved in the handling of real estate transactions, it was a known and understood fact that the defendant/law firms were the attorneys for the defendant/banks and the defendant/abstract company furnished a greater number of the title services required by the defendant/banks and the defendant/law firms. The undersigned further affirms that to the best of his knowledge during the years 1973 through 1978, these exclusive associations in the form of retainers or otherwise between the defendant/law firms and the defendant/banks above-noted existed and operated in such a way as to chill, stifle and prevent competition by other financial institutions and other lawyers. That between 1973 and 1978, the four defendant/banks controlled approximately 75% of the commercial mortgage loan market in Lee County and on account of their exclusive arrangements with the defendant/law firms, the defendant/law firms in turn enjoyed a monopolistic hold in this area of law practice which tended to exclude other lawyers from this practice by insisting that their law firm members (the defendants) were the ones that must represent the parties at the closings, and often, as a matter of routine practice, these lawyers' fees would be paid by the purchaser-borrowers.

3. The undersigned further affirms that the defendant, Gulf Abstract & Title Company, was formed by a group of lawyers for the purpose of attempting to control the commercial, mortgage loan market in Lee County and toward that end,

(Continued on following page)

ican Tobacco Co. v. United States, 328 U.S. 781, 809-810 (1946), then summary judgment must be denied and the question submitted to a jury, *Poller, supra* at 473; *Norfolk Monument, supra* at 704.

Amey's claim, after all, "is not merely a private matter . . . the plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest," quoted most recently in *Mitsubishi, supra*, 105 S. Ct. at 1358. Viewed generally, the court of appeals' decision in this case, upholding both the denial of document and interrogatory discovery and denial of access to a jury through the grant of summary judgment, for the reasons suggested in the opinion's conclusion, quoted above, should be reviewed by this Court because it represents a frontal attack upon a basic democratic principle—the right of an individual to judicial access regardless of the identity of his opponents.

2. As noted above, the test applied by the court of appeals in this case to determine whether summary judgment was proper regarding the existence of an agreement

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(Continued from previous page)

would extend discounts for any business brought in by its lawyer stockholders. Members of the defendant/law firms are active stockholders and at various times from 1974 through 1978, were either members of the board of directors or officers of the defendant/Gulf Abstract & Title Company. Gulf Abstract & Title Company during the period of 1974 through 1978 and still does, periodically, circulate its price schedules and has on occasion included attorney fee statements, the amount of which is graduated in proportion to the amount of the purchase price of the real estate without regard to the time expended on the particular transaction or the nature of the services to be rendered by the lawyer in the given transaction.

4. Affiant further states that the real estate practice in Lee County during the times hereinabove mentioned, was almost exclusively within the control of the defendants thereby stifling any really competitive practice or business in this area during said period of time.

Further Affiant saith not.

is that the plaintiff, to defeat summary judgment, must have introduced "significant probative evidence" which demonstrates that defendants acted against "their economic self-interest," 758 F.2d 1505. As is apparent from the decision, such test has been adopted in the fifth and eleventh circuits. See, *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1027 (5th Cir. 1983); *Pan-Islamic Trade Corp v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir. 1980). As will be shown, the application of such a requirement at the summary judgment stage has become the source of significant conflicts among and within the eleventh, fifth, third, seventh, and fourth circuits.

The source of the rule—requiring proof which eliminates the possibility of independent action—is asserted to be this court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), the only decision of this court to affirm the grant of summary judgment for a defendant in a Sherman Act case on the issue of concerted action. It should be emphasized, however, that in *Cities Service, supra*, the district court denied summary judgment to all but one of the numerous defendants and granted that one motion only after many years of complex and exhaustive pre-trial discovery. In any event, the rule in question is intended, to the extent it actually was applied in *Cities Service*, for allegations of concerted refusal to deal, not, as in this case, price-fixing. See, *e.g.*, *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485, at 501 (Appendix) (11th Cir. 1982).

This Court should clarify that the rule makes no sense, economically or logically, in a price-fixing case, as applied by the court of appeals in this case. Persons form cartels and agree to stabilize prices precisely because it is in their economic self-interest to do so: "A contract among competing sellers to fix the price of the product they sell . . . is like any other contract in the sense that the parties would not sign it unless it made them all better off than before. But it injures others, consumers, who are not parties to

the contract," Posner, *Economic Analysis of Law*, 2nd Ed. 1977, p. 211.

Thus, a unilateral decision by a law firm respondent to establish prices for real estate services parallel to and in conformity with the price list of Gulf Abstract, which it partly controls, is not necessarily consistent with its economic self-interest; such a decision easily could be seen as supporting a combination among law firms to stabilize prices, however, which then would be consistent with its interest in maintaining higher profits. An inference regarding the existence of such a combination becomes more likely, regardless of the "economic self-interest" of the law firms, when it is shown that the law firms created, operate, and compete with Gulf Abstract in combination with each other in a highly concentrated market and cause Gulf Abstract to create and circulate premium schedules. "The smoothly functioning cartel is less likely to generate evidence of actual agreement . . . The complete conspiracy often escapes attention," Posner, *supra*, p. 213. In no price-fixing case has the government ever attempted to show that defendants acted against their economic self-interest in joining the cartel.

The second flaw in the court's reasoning—in addition to applying the test in price-fixing cases—is in making the "against economic self-interest" test for concerted action a requirement of proof at the summary judgment stage which the plaintiff must meet—a necessary "plus" factor —rather than merely one of several possible sufficient plus factors (such as combined participation in a joint venture) from which, together with conscious parallelism, to infer concerted action. See, *C-O Two Fire Equipment Co. v. United States*, 197 F.2d 489 (9th Cir.), *cert. den.*, 344 U.S. 892 (1952); Sullivan, *Handbook of the Law of Antitrust* at 315-19 (1977).

The more the lower courts apply the "against economic self-interest" test as a necessary, rather than sufficient, element of proof of concerted action to avoid summary judgment, the fewer antitrust cases that will get to

trial. While such a result doubtlessly will please the antitrust defense bar, it amounts to judicial legislation inconsistent with Rule 56(c), F.R. Civ. P. in a manner which could undermine the efficiency and competitiveness of our economy. See, most recently, *Park v. El Paso Board of Realtors*, 764 F.2d 1053, 1060, fn. 11 (5th Cir. 1985): "Once plaintiff has established a setting that bespeaks accord—the conscious parallel action is probative of the existence of a conspiracy whether or not it is potentially explicable in terms of the actor's self-interest. It is up to the jury to determine . . ." See, for an interpretation of the history of Rule 56(c) in another conspiracy context, *Adickes v. Kress & Co.*, 398 U.S. 144, 153-161 (1969).

It must be emphasized, in this case as well as *Matsushita*, that logically and constitutionally the courts must be careful to create a quantum of proof requirement for plaintiffs at the summary judgment stage—relevant to whether a jury ever gets the case—which is more lenient than the preponderance of evidence standard applicable at the trial and included in jury instructions, particularly where pre-trial discovery has been truncated: the Seventh Amendment and Rule 38(a), F.R. Civ. Pro., guarantee a plaintiff a right to a jury—not a court—determination of ambiguous and disputed inferences of fact at trial. See, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962), cited most recently in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847, 2858 (1985). Thus, this court has held that even when a court does not believe that the plaintiff proved the existence of a combination by a preponderance of the evidence—such as by excluding any possibility of independent action—the court should not deprive the plaintiff of a jury trial or overrule a verdict unless no inference of a combination was reasonably possible.

This court, in *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1471 (1984), held that, to prove a vertical Sherman Act agreement "there must be evidence that tends to exclude the possibility that the manufacturer

and nonterminated distributors were acting independently." One issue in *Matsushita* will be whether to extend the *Monsanto* rule from vertical distributor termination cases to horizontal price-fixing cases. However, an additional issue, also relevant to the instant case, is whether to extend the *Monsanto* requirement, developed for a trial proceeding, to the summary judgment stage of a case. The *Monsanto* rule is to be expressed in instructions submitted to the jury; it should not be applied by the district court to determine whether to let the case go to a jury in the first place.

The eleventh circuit's holding, challenged herein, has achieved such a result. As such, eleventh circuit precedent conflicts with *In Re Japanese Electronic Products, supra,* 723 F.2d at 258-259, 304-305, with respect to how sincerely the courts require construction of inferences in favor of the party opposing summary judgment. See, more recently, *Tunis Bros. Co., Inc. v. Ford Motor Co.,* 763 F.2d 1482, 1490-91 (3rd Cir. 1985), and *Fragale & Sons Beverage Co. v. Dill,* 760 F.2d 469, 473-74 (3rd Cir. 1985). In both *Tunis Bros. and Fragale* the Third Circuit reversed the grant of summary judgment for defendants in a Sherman Act conspiracy case; nevertheless, a comparison between the two decisions illustrates the pervasiveness of the conflict.

In *Fragale, supra,* the third circuit panel applied the *Monsanto* language quoted above, which, as noted, was developed for a jury instruction, dealer termination context, to a summary judgment, horizontal combination case, without noting the distinction: "If an antitrust plaintiff raises genuine issues of fact as to the existence of a common scheme or commitment, *and the unlikelihood of independent action on the part of the defendants,* the issue of whether the defendants unlawfully conspired belongs with the jury," 760 F.2d at 474 (emphasis added). On the other hand, in *Tunis Bros., supra,* the third circuit held, "The character and effect of an alleged conspiracy are determined only by analyzing the activities in question as a whole, *Continental Ore Co. v. Union Carbide,* 370 U.S.

at 699, . . . This court 'need not affirmatively find that a conspiracy exists, but merely that there are factual questions concerning such a conspiracy in order to deny the motions for summary judgment' . . . we will look to the [pre-trial record] to determine *whether the facts alleged by plaintiffs are susceptible of an interpretation that might* give rise to an inference of a conspiracy," 763 F.2d at 1491 (emphasis added).

Obviously, the *Fragale* rationale, requiring proof that excludes independent action, makes it much more difficult than the *Tunis Bros.* standard for a Sherman Act plaintiff to avoid summary judgment and get to a jury. While the *Fragale* requirement might be appropriately included in instructions given to a jury, at least in a dealer termination case, *Tunis Bros.*, but not *Fragale,* truly does resolve any reasonable inference against summary judgment.

The Eleventh Circuit decision in the instant case was consistent with *Fragale* but inconsistent with the holding in *Tunis Bros.* That the dispute is real, pertinent, and not "academic" is demonstrated by the fact that Judge Hunter, the author of *Fragale,* dissented in *Tunis Bros.* on exactly this issue: "By ignoring the necessity of disproving the likelihood of independent activity, the majority opinion allows appellants in this case to sidestep summary judgment on the basis of evidence which, even if believed, would only establish that an opportunity to conspire existed," 763 F.2d at 1503 (Hunter, J., dissenting).

The identical conflict is evident in a recent fourth circuit decision, *Terry's Floor Fashions v. Burlington Industries,* 763 F.2d 604 (1985). Compare the majority decision, affirming the grant of summary judgment for defendants on the issue of concerted action ("the plaintiff has failed to produce evidence tending to exclude the possibility that [defendants] were acting independently," 763 F.2d at 614, with the concurrence by Judge Winter, disagreeing, *id.* at 616.

The required need that the plaintiff disprove the likelihood of independent activity to avoid summary judgment

places a burden on the party opposing summary judgment much greater than that contemplated by Rule 56(c) and interferes with the right to a jury trial. Such a requirement is but a more general statement, as noted above, of the eleventh circuit standard challenged herein: that plaintiff must provide significant probative evidence that defendants acted "against their economic self-interest," 758 F.2d 1505.

The court's misunderstanding is explicated in another recent fifth circuit decision, in addition to *El Paso Board of Realtors, supra,* 764 F.2d at 1053, which, in reversing the grant of summary judgment for an antitrust defendant, conflicts squarely with the *Fragale* requirement and with the decision in this case: "The defendants rely with some confidence upon the statement . . . that . . . the antitrust plaintiff is obliged to produce significant evidence contrary [to the existence of a combination]. However, this principle was not intended to apply to a situation where, under the factual showing, a reasonable finder of fact could draw from objective conduct a conflicting inference of anticompetitive intent . . .," *Powers v. Nassau Devel. Corp.,* (5th Cir.) 753 F.2d 457, 462. In other words, where the antitrust plaintiff has proved consciously parallel conduct plus direct evidence of other objective conduct suggesting a violation (such as, in the instant case, a combination to operate a joint venture), then the plaintiff does not have to disprove the possibility of independent action to avoid summary judgment.

Such a situation, also analogous to that in the instant case, arose in *Moore v. Boating Industry Associations,* 754 F.2d 698 (7th Cir. 1985). There, the plaintiff prevailed at trial in a Sherman Act case against members of a joint-venture trade association. On appeal, the defendant claimed that the wrong test for proof of concerted action was used —that evidence of a conspiracy instead "must be inconsistent with any other rational conclusion," 754 F.2d at 711, fn. 22. The court recognized, in rejecting such a test, that it arose from the earlier "hypothesis of innocence"

jury instruction in criminal cases which, even in criminal conspiracy cases, was no longer good law, 754 F.2d at 712, fn. 22.

This court's last word—its most recent decision—on the question raised here concerning the burden on an antitrust plaintiff in opposing summary judgment is contained in *Norfolk Monument Co., supra,* 394 U.S. at 704: "We express no opinion, of course, on the strength or weakness of the petitioner's case, but hold only that the alleged conspiracy had not been conclusively disproved by pre-trial discovery and that there remained material issues of fact which could only be resolved by the jury after a plenary trial." Although some lower courts have been straying from that holding, reversing the burden of proof at the summary judgment stage, *Norfolk Monument* is consistent with the language of Rule 56(c) and this court's prior precedent. The disarray in the lower courts, along with this court's decision to hear *Matsushita*, demonstrate that the issue should be firmly resolved.

3. Both the district court (564 F. Supp. 1130) and the court of appeals (758 F.2d 1504-05) recognized that respondent law firms combined to create and operate Gulf Abstract as a joint venture; respondents caused Gulf Abstract to enter the directly competitive real estate title insurance business and circulate price lists among the respondents. Nevertheless, the court of appeals held that the direct evidence of those joint venture activities was insufficient, even when combined with inflated, consciously parallel pricing, to permit an inference of a combination among Gulf Abstract and its participants to stabilize prices.

The effect of this ruling is to immunize joint ventures from antitrust scrutiny, for if the joint venture is not conceded to be a combination, then courts never will need to address the issue of whether certain joint venture activities are anticompetitive and inefficient. This is true at a time when joint ventures are becoming more prevalent in our economy.

Congress recently passed legislation, The National Cooperative Research Act of 1984, P.L. 98-462, designed partly to immunize research joint ventures from Sherman Act liability. However, it is clear from the legislative history of the act, expressed in Section 2(b) (1) and (2) of the act (CCH Trade Reg. Reporter Vol. 4, p. 30, 668), that congress was concerned with and did not wish to immunize joint ventures utilized to stabilize prices. At the same time, the Justice Department also has gone on record as endorsing the use of joint ventures, but only when such ventures are likely to promote increased output or efficiency, not when they are used as artifices to create a cartel. See, Remarks of J. Paul McGrath, delivered Nov. 2, 1984 in Cambridge, Massachusetts, CCH Trade Reg. Report No. 675 (Nov. 5, 1984). See also, Brief for the United States as Amicus curiae in *N.C.A.A.*, infra, S. Ct. No. 83-271, at p. 11: "If a limited examination reveals that [a joint venture's] principal purpose or effect is to stabilize prices or restrict output of products previously sold by the venturers independently . . . its restrictive conduct should be struck down as unlawful under a truncated rule of reason analysis without further scrutiny" (footnote omitted).

In any event, if the courts, including the eleventh circuit in this case, refuse to acknowledge that a joint venture is a combination as a matter of law, antitrust enforcement will be substantially undercut, because Section One of the Sherman Act simply will not be applicable.

This court recently has investigated the legality under Section One of conduct by joint ventures in three cases: *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 105 S. Ct. 2613 (1985); *N.C.A.A. v. Board of Regents of the Univ. of Oklahoma and University of Georgia Athletic Association*, 104 S. Ct. 2948 (1984); and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). In each of those cases, this court declined to apply the *per se* rule of illegality; nevertheless, the court closely examined the conduct of the respective ventures in the context of their respective markets.

The existence of a combination was not contested in any of the three cases—it was presumed. That was because it has been well-established that when, as in the instant case, direct competitors combine to incorporate a venture, own its stock, and direct its activities, the venture is, itself, a combination, and its conduct is attributable to its participants. See, *United States v. Sealy, Inc.*, 388 U.S. 350, 352-54 (1967) (marketing association controlled by competing distributors is a horizontal combination)—as interpreted by this court in *N.C.A.A.; supra,* 104 S. Ct. at 2959, fn. 18.

Indeed, this court in *N.C.A.A.* squarely noted such a rule, although in *dicta*: "By participating in an association which prevents member institutions from competing against each other on the basis of price . . . the N.C.A.A. member institutions have created a horizontal restraint —an agreement among competitors on the way in which they will compete with one another," 104 S. Ct. at 2959. See also, *Goldfarb v. Virginia State Bar, supra,* 421 U.S. 773.

Thus, when respondents combined to create and participate in Gulf Abstract, cause Gulf Abstract to sell title insurance, and cause Gulf Abstract to create and circulate rate cards throughout a highly concentrated market, resulting in parallel inflated prices, Gulf Abstract and its members "have created a horizontal restraint—an agreement among competitors." Plaintiff still must demonstrate that the combination was predominantly anticompetitive in purpose or effect, but the agreement, itself, has been established—or so one would have though prior to the court of appeals decision in this case. The seventh circuit confronted the same issue in *Moore, supra,* 754 F.2d at 711, fn. 20, and held that membership in a joint venture association established evidence of a Sherman Act combination. In the instant case, of course, the issue is not whether the existence of a combination has been sufficiently established at trial; the issue, as described above, is whether, after resolving inferences in favor of plaintiff, the role

of the joint venture is sufficiently probative of a combination to allow the jury to decide the issue. This court should use this case, with its clearly delineated factual setting and highly concentrated market, as a vehicle to reassert that proof of joint venture activities is sufficient as a matter of law, with or without additional circumstantial evidence, from which to infer a horizontal agreement among the venturers.

4. This case should be reviewed by the court for the additional reason that it will allow the court to resolve a related, practical civil procedure issue of growing urgency: whether the exercise of discretion by a district court in limiting pre-trial discovery necessarily curtails and should be considered in conjunction with the court's discretion to grant summary judgment.

In other words, when a court is adjudicating a motion for summary judgment under Rule 56(c), F.R. Civ. P., and must determine whether the party opposing judgment has produced a sufficient record to create a genuine issue of material fact, the court must consider the opportunity which that party has enjoyed to produce such a record. The greater the amount of discovery, the more appropriate summary judgment—and the less likely the court should be to accord the opposing party the benefit of the doubt. See, *e.g., Cities Service, supra,* 391 U.S. at 280. On the other hand, where the court previously has limited or curtailed discovery, it should grant the party opposing summary judgment greater latitude in indulging in inferences.

This issue—whether under Rule 56(f), F.R. Civ. Pro., the amount of pre-trial discovery must be a factor to be considered in ruling on a summary judgment motion—is particularly timely in view of the mounting criticism of "discovery abuse" and the increasing use of sanctions to curtail such abuse. Thus, while trial judges are being pressured to modify the traditionally liberal discovery policy of the Federal Rules, they are also being challenged by other critics to justify the role of a jury in so-called "com-

plex" cases. The most "efficient" way to avoid the latter problem, of course, is to grant summary judgment.

While the two suggestions—to curtail discovery and curtail the role of a jury in complex cases—may have merit independently, when applied in the same case they result in a drastic revision of the principle of judicial access. Rule 56(f), F.R. Civ. P., for example, cautions that courts should grant to parties opposing summary judgment every discovery opportunity to develop the necessary record or, alternatively, should deny summary judgment. The cautioned "sparing" use of summary judgment in antitrust cases, as quoted above from *Poller, supra,* 368 U.S. at 473, was a recognition of the difficulty in obtaining adequate discovery in such cases, "where hostile witnesses thicken the plot."

In the instant case, both the district court and court of appeals considered the issues of the premature termination of discovery and tests for opposing summary judgment separately, as if they were unrelated. The simple, stark fact, as described above, is that the court denied plaintiffs' motions to compel discovery and stayed all discovery (Pet. App. F) without allowing even preliminary document or interrogatory discovery. Moreover, all depositions taken by petitioners—virtually the entire record in this case— were from "hostile witnesses": senior employees or partners of defendants. As the court of appeals recognized, plaintiffs' preliminary discovery requests were relevant and necessary to determine the identity of material witnesses—and documentary evidence they might possess—concerning the issue of an agreement, 758 F.2d 1506.

At the very least, the identity of the members of the board of directors of Gulf Abstract at relevant points in time, together with correspondence among them and minutes of directors' meetings, would have been highly relevant. That kind of information obviously was subject to production under Rule 26(b)(1), F.R. Civ. P., which requires a showing only that the "information

sought appears reasonably calculated to lead to the discovery of admissible evidence." Whatever the discretion possessed by the district court, that discretion was clearly abused in this case in refusing to allow even preliminary discovery, except for depositions of hostile witnesses.

Such an abuse of discretion was magnified, however, when the court subsequently granted summary judgment on the ground that plaintiffs had failed to produce a sufficient record to support the circumstantial evidence of conscious parallelism and create an inference of an agreement, and failed to produce evidence regarding the anticompetitive effect, or unreasonableness, of defendants' conduct. As the third circuit observed in *In Re Japanese Electronic Products*, 723 F.2d at 259, "A court may not, of course, by a premature resort to a Rule 56 Order, deprive the party resisting it of a fair opportunity to present facts essential to justify his opposition." This is particularly true in antitrust cases. In *Antitrust Advisor*, 2d Ed., McGraw-Hill Book Co., § 11.53, pp. 791-92, it is observed:

> "Skillful use of discovery tools is essential in prosecuting private antitrust cases. In the ordinary case, so much information is in the possession of the defendants and so little is in the possession of the plaintiff that the plaintiff will have serious difficulty proving his case unless he can force the defendants to disclose the evidence. A plaintiff is entitled to obtain discovery before his case is thrown out on summary judgment, at least if the discovery might permit him to show the facts necessary to defeat the motion. See Fray Readimix Concrete, Inc. v. Pinehill Concrete Mix Corp. (2d Cir. 1977) 554 F.2d 551. Discovery is not required, however, where the defendant admits all the facts which a plaintiff might hope to discover, see Universal Brands, Inc. v. Philip Morris, Inc. (5th Cir. 1977) 546 F.2d 30 . . ."

The district judge's finding that the defendants, by admitting parallel pricing and processing in the transac-

tions forming the subject of this action, can thereby subvert plaintiff's rights to discovery under the rules, has the effect of permitting the defendants to judge and determine what discovery and the extent of discovery a plaintiff should be allowed: to vastly expand the law of privilege.

The second circuit recently observed, in a securities fraud decision reversing the grant of summary judgment for defendant, that trial courts must address the sufficiency of discovery and the propriety of summary judgment together, not as isolated issues, *Gary Plastic Packaging v. Merrill, Lynch,* 756 F.2d 230, 236 (2nd Cir. 1985). The court held: "it was an abuse of the trial court's discretion to grant summary judgment when plaintiff had moved to amend its complaint and had not conducted discovery . . . 'The undesirability of granting summary judgment to defendants . . . before discovery has been completed . . . dictates liberality in allowing such complaints to be amended to reflect facts already discovered,' " *id.*

This court should use this case as a vehicle to address the relationship between "termination of discovery" and "propriety of summary judgment" issues for an additional reason. As described above, the court of appeals affirmed the grant of summary judgment with respect to the two non-price vertical restraint counts alleged by petitioners: exclusive dealing between the banks and law firms, and tying among the banks, bank customers and law firms.

The court of appeals held that the tying count did not state even a rule of reason Sherman Act claim, and that there was insufficient record evidence of "anticompetitive effects" to support the exclusive dealing count, 758 F.2d at 1503-04. But there had been no discovery by either party—except for the Rose affidavit, *supra,*—regarding the issue of anticompetitive effects or reasonableness: the record was empty of such evidence because discovery had been terminated, yet the existence of the vertical agreements, as alleged in the complaint, had been stipulated to by the defendants.

The court of appeals has thus endorsed a use of "discretionary" control of discovery which violated the rule of *Adickes v. Kress, supra,* 398 U.S. 144, 157, insofar as defendants failed to first come forward with evidence regarding lack of anticompetitive effects; see, most recently, *Catrett v. Johns-Manville Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985). The court did so in a manner which undermined this court's recent reassertion of the primacy of the "Rule of Reason" and its specific vertical non-price restraints precedent; see, *Jefferson Parish Hospital,* 104 S. Ct. 1551, at 1563. This court has attempted to re-focus Sherman Act litigation upon the "Rule of Reason," but such authority will be without effect if Sherman Act plaintiffs, alleging Rule of Reason violations, are never allowed by the lower courts to obtain discovery relevant to the unreasonableness of a vertical combination before the grant of summary judgment for defendants. As the Justice Department confirms, "While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the marketplace can be assessed, market power is only one test of 'reasonableness,'" Brief for the United States as amicus curiae in *N.C.A.A., supra*, S. Ct. No. 83-271, p. 20. See, most recently, *Data General Corp v. Digidyne Corp., et al.*, 105 S. Ct. 3535 (1985) (White, J., dissenting from the denial of certiorari): "this case raises several substantial questions of antitrust law and policy, including what constitutes forcing power in absence of a large share of the general market . . ." Petitioners sought to raise the same questions in this case but never got very far because discovery was disallowed.

The result achieved by the court of appeals—greater "efficiency" in complex litigation—is important and it is wrong. Review by this court is warranted.

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CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

AMEY, INC., and John C. Amis, Jr.,
Plaintiffs-Appellants,

v.

GULF ABSTRACT & TITLE, INC., et al., Defendants-Appellees.

AMEY, INC., and John C. Amis, Jr.
Plaintiffs-Appelles,

v.

GULF ABSTRACT & TITLE, INC., et al., Defendants-Appellants.

Nos. 83-3393, 83-3520.

United States Court of Appeals,
Eleventh Circuit.

April 29, 1985.

Before JOHNSON and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

HATCHETT, Circuit Judge:

In this antitrust appeal we review the district court's ruling on issues of standing to sue, commencement of the statute of limitations, tying arrangements, exclusive dealing, price-fixing, discovery, and attorney's fees. We affirm.

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* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

FACTS

Amey, Inc., is a closely-held corporation involved in the business of construction, commercial investment, and real estate development in the state of Florida. In late 1976, John Amis, its president, approached Lee County Bank for financing to purchase property owned by Sharon Hogue and the estate of Adrian Hogue. Appellants, John Amis and Amey, Inc. (Amey), contend that Lee County Bank's provision of financing was conditioned upon Amey's agreement "to purchase a real estate title search and opinion" from appellees, Henderson, Franklin, Starnes & Holt, P.A., a law firm, (Henderson), or to pay Lee County Bank $325 for the same title search and opinion to be provided by Henderson. Amey agreed to this condition, and the bank requested a title opinion from the Henderson law firm.

Prior to October 10, 1976, an abstract of title for the Hogue property was furnished to appellee, Gulf Abstract and Title, Inc. (Gulf Abstract), to be updated and certified as complete and correct. This abstract was updated through October 10, 1976, and certified by Gulf Abstract as being a true copy of all the public records affecting title to the Hogue property. On October 29, 1976, Henderson rendered its "Preliminary Opinion of Title" covering the period up to and including October 10, 1976.

On the afternoon of November 3, 1976, the Internal Revenue Service (IRS) recorded a lien in the amount of $32,107.52 against the property owned by Sharon Hogue and the estate of Adrian Hogue in the Public Records of

Lee County, Florida, for taxes due. Neither Amey, Lee County Bank, nor Henderson was aware of the IRS recording, and no one requested that the law firm make a title search covering the period subsequent to October 10, 1976. Lee County Bank made the loan and Amey purchased the property on November 23, 1976. At the closing, Lee County Bank charged Amey the $325 fee it had paid to Henderson.

After discovery of the IRS lien in 1977, Amey brought a negligence action against Henderson and its insurer, Gulf Insurance Company in Florida state court. The complaint alleged that Henderson owed Amey a reasonable duty of care in the preparation of the title opinion, including a duty to disclose whether the preliminary opinion of title fell below the usual standard for title examinations. The Circuit Court of Lee County granted summary judgment for Henderson and Gulf Insurance finding that "no attorney-client relationship existed between the defendant law firm, Henderson, Franklin, Starnes & Holt, P.A., and the plaintiff and that Henderson . . . owed no legal duty to the plaintiff, Amey, Inc." *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.*, No. 77-2958 (20th Cir. Fla. March 7, 1978) (Summary Judgment Order). The Florida Second District Court of Appeals affirmed, *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.*, 367 So.2d 633 (Fla. Dist.Ct.App.), *cert. denied*, 376 So.2d 68 (Fla.1970).

In late 1980, Amey, filed the present action in federal district court under the Clayton and Sherman Acts.[1] The complaint named Gulf Abstract, Henderson, Lee County Bank, and other banks and law firms involved in the practice of real estate law and the provision of commercial mortgage financing in the Lee County area.

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1. Section 4 of the Clayton Act, 15 U.S.C.A. § 15 (Supp.1980) provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue. . . ."
Section 16 of the Clayton Act, 15 U.S.C.A. § 26 (Supp.1984) provides in relevant part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ."

Section 1 of the Sherman Act, 15 U.S.C.A. § 1 (Supp.1984) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act, 15 U.S.C.A. § 2 (Supp.1984) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Count I alleges that the banks and law firms forced Amey to pay inflated prices for legal services and mortgage financing because of a price fixing conspiracy. Count II alleges that the exchange of fixed price information between banks and law firms caused an unreasonable restraint of real estate legal practice and commercial and residential mortgage financing in Lee County. Count III alleges that Lee County Bank and Henderson had a tying arrangement by which all those purchasing mortgage financing from Lee County Bank were "required to purchase and pay for title services and title opinions provided by Henderson at inflated prices." This arrangement purportedly prevented other lawyers in the Lee County area from receiving Lee County Bank's 30 percent share of the market for commercial legal title work and its 20 percent share of all legal title work and mortgage financing in the county. Count IV repeats the allegations of Count III under the heading of "exclusive dealing." Count V alleges that Lee County Bank required each of its real estate mortgage financing customers to agree to purchase the real estate title opinion services of Henderson at purchase or upon resale at a prearranged fixed price. Count VI alleges market and customer allocation arrangements between the respective combinations of banks and law firms by which the law firms agreed not to advertise or otherwise compete for the work of any bank other than their "partner." Similarly, the banks also agreed not to deal with any law firm other than their "partner." The injury Amey alleged is the inflation of the price for title opinion work. Count VII alleges that the law firms have engaged in a group boycott and have refused to deal with nonlawyers who are capable of performing title opinion work, by causing the providing of real estate title searching and

opinion services to be included within the definition of "the practice of law." Count VIII alleges a monopoly based on the previous counts, and Count IX alleges an attempt to monopolize the practice of real estate legal services and commercial mortgage financing in Lee County. Count X makes a general claim under the Florida antitrust statutes (Fla.Stat.Ann. § 542.01-542.13, repealed in part by Laws 1980, C. 80-28 § 3 (1980) and amended by Laws 1980, C. 80-28 § 2 (1980)).[2] County XI alleges a breach of fiduciary duty owed by Lee County Bank to Amey through its failure to disclose that the $325 paid to Lee County Bank for Henderson's Services was an "add on cost to the cost of obtaining said loan, and that [Amey] received absolutely no protection or benefit therefrom." Finally, Count XII alleges state claims to be addressed through the district court's pendent jurisdiction.

ISSUES

The issues presented are: (1) whether Amey has standing to sue for damages; (2) whether the antitrust statute of limitations bars Amey's claims; (3) whether Amey provided sufficient evidence of the existence of a typing arrangement, of exclusive dealing, of price-fixing and customer allocation agreements, and of exchange of price information to survive summary judgment; (4) whether the district court abused its discretion in staying discovery; and (5) whether the district court erred as a matter of law in denying appellees' attorney's fees.

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2. Fla.Stat.Ann. § 542.33, provides in part:

> (1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections (2) and (3) hereof, is to that extent void.

STANDING

I. Suit Under Section 4 of the Clayton Act.

Section 4 of the Clayton Antitrust Act allows treble damage recovery to: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . . " 15 U.S.C.A. § 15, *as amended* Pub.L. No. 96-349, § 4(a) (1), 94 Stat 1156 (1980) (current version at 15 U.S.C.A. § 15 Supp.1984)). Amey asserts standing to sue for treble damages under this statute. The district court determined that Amey has only "questionable standing."[3] *Amis v. Gulf Abstract & Title, Inc.*, 564 F.Supp. 1121, 1124 n. 1 (M.D.Fla.1983).

[1] To sue for treble damages under section 4 of the Clayton Act, the complaint must facially satisfy that section's requirements. First, the complainant must be a "person." The United States is not a person under this section, but can sue under section 4A of the Clayton Act, 15 U.S.C.A. § 15a (Supp.1984). Second, actual injury must be alleged. The Supreme Court has provided the lower courts with some assistance in the identification of a "person injured." In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the Court restricted the "passing on" defense by which a defendant could argue that a plaintiff/purchaser was not a "person injured" where the defendant passed on to those customers the higher, inflated price caused by the antitrust violation. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). *See* Note, *Private Antitrust*

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3. Amey argues that it at least has standing to sue for injunctive relief.

Standing, 61 Wash. U.L.Q. 1069 n. 4 (1984); Gardner, *Private Enforcement,* 25th Annual Antitrust Law Institute 711, 715 (1984). In *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Supreme Court addressed the question of whether the passing on of inflated prices caused by an antitrust violation could be used offensively. Under such a theory, a customer who paid the higher price could qualify as a "person injured" under the Clayton Act. The Court held that indirect purchasers could not sue under the Clayton Act for treble damages: "The overcharged direct purchaser, and not others in the chain of manufacture or distribution is the party 'injured.'" *Illinois Brick,* 431 U.S. at 729, 97 S.Ct. at 2066. In *Reiter v. Sonotone Corp.,* 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), the Supreme Court substanitally limited the direct purchaser requirement by holding that consumers could sue under limited circumstances. It held that the higher, inflated price paid was "property" as contemplated by the Clayton Act.

The third requirement for suit under section 4 of the Clayton Act is that the "business or property" injury must be of a commercial nature. *Hawaii v. Standard Oil Company of California,* 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed. 2d 184 (1972). Fourth, a complainant must allege that the injury suffered was an "antitrust injury": "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

[2] For a court to find that a plaintiff has standing to bring an antitrust claim, more than constitutional standing must exist; the court must find a close relationship be-

tween the plaintiff's injury and the alleged antitrust violation. *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 535, 103 S.Ct. 897, 907, 74 L.Ed.2d 723 (1983).

> Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale LJ 809, 813, n. 11 1977); Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine,* 32 ABA Antitrust LJ, 5, 6-7 (1966).

Associated General, 459 U.S. at 535 n. 31, 103 S.Ct. 907 n. 31. *See also,* Note, 61 Wash.U.L.Q. at 1070 n. 5.

II. Antitrust Standing.

Although agreement on the basic requirements of an antitrust complaint exists, a variety of formulations has been developed by the federal circuits, varying the quality and quantity of the relationship among the elements, "persons injured," "injury," and "business or property." *See* Note, 61 Wash.U.L.Q. at 1070 n. 6, n. 7, 1083-1100 (reviewing the divergent tests of antitrust standing in the federal circuits). The "direct injury" test was among the first antitrust tests federal courts employed. Under this test, to have standing, a plaintiff must have been in a direct commercial relationship with the defendant at the time of the injury. *Loab v. Eastman Kodak Co.,* 183 F. 704 (3d Cir. 1970); *Ames v. American Telephone and Telegraph Co.,* 166 F. 820 (C.C.D.Mass.1909). Some courts have also required privity of contract. *See* Note, 61 Wash.U.L.Q. at 1073 n. 22. The direct injury test requires the trial judge

to make the subjective determination of which injuries are direct and which are not direct. *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing,* 86 Yale L.J. 809, 819 (1977).

As a derivative of the direct injury test, some circuit courts grant standing only to persons within the market affected by the antitrust violation. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 478 n. 14, 102 S.Ct. 2540, 2548 n. 14, 73 L.Ed.2d 149 (1982). To obtain standing under this target area test, plaintiff "must be one against whom the conspiracy is aimed. Or, . . . the complainant must show that he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Jeffrey v. Southwestern Bell,* 518 F.2d 1129, 1131 (5th Cir.1975). While the traditional target area test requires that the antitrust violators "aim" at the plaintiff, proof of conspiratorial intent to injure is not necessary. All that is required is that the plaintiff be in the sector of the economy which is the target of the antitrust violation. *Blue Shield v. McCready,* 457 U.S. at 479 n. 15, 102 S.Ct. at 2548 n. 15; *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.,* 710 F.2d 752, 765 (11th Cir.1983). A more recent formulation of the target area test requires that the plaintiff be a foreseeable victim of the anti-competitive conduct. *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880, 85 S.Ct. 143, 13 L.Ed.2d 87 (1964). *See also* Note, 61 Wash.U.L.Q. at 1076, 1076 n. 38-41.

The Sixth Circuit created a third test in *Malamud v. Sinclair Oil Corp.,* 521 F.2d 1142 (6th Cir. 1975), and the Supreme Court adopted it in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d

701 (1978). Under the Sixth Circuit test, to have standing to sue for antitrust injuries, the plaintiff's injuries must fall within the zone of interest protected by the antitrust laws. *Malamud v. Sinclair Oil,* 521 F.2d at 1151-52. Indistinguishable in its requirements from the zone of interest test is that of the *Brunswick* test, which requires a showing that the injury is of the "type that the statute was intended to forestall." *Brunswick Corp.*, 429 U.S. at 487-88, 97 S.Ct. at 697 (quoting *Wyandotte Corp. v. United States,* 389 U.S. 191, 202, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967)). The final test of antitrust standing is that applied by the Third Circuit. It is a policy-balancing test containing many factors in lieu of a "talismanic test capable of resolving all . . . standing problems." *Bravman v. Bassett Furniture Industries, Inc.,* 552 F.2d 90, 99 (3d Cir.1977).

The authoritative words on the testing of antitrust standing have been provided by the Supreme Court in *Blue Shield v. McCready* and *Associated General Contractors v. California State Council of Carpenters. Blue Shield* involved the refusal of a health plan to reimburse subscribers for psychotherapy services provided by psychologists, while reimbursing subscribers for psychotherapy services provided by psychiatrists. In its interpretation of the Clayton Act's treble damages provisions, the Court endorsed the target area test. The Court found that McCready had standing to sue for treble damages since no possibility of double recovery existed because the psychologist who was paid by McCready could "link no claim of injury to himself arising from his treatment of McCready. . . . [The psychologist] has been fully paid for his service and has not been injured by the Blue Shield's refusal to reimburse her for the cost of his services." *Blue Shield,*

457 U.S. at 475, 102 S.Ct. at 2546. Additionally, the injury suffered by McCready was not too remote from the antitrust violation because McCready's injury was not only foreseeable, but was a "necessary step in effecting the ends of the alleged illegal conspiracy." *Blue Shield*, 457 U.S. at 479, 102 S.Ct. at 2549. Since McCready suffered an antitrust injury, the *Blue Shield* Court held that McCready was a "person injured" had standing to sue under the Clayton Act.

Associated General Contractors v. California State Council of Carpenters involved the claim of a union that a multi-employer association coerced third parties and other members of the employer association to enter into business relationships with nonunion contractors and subcontractors. In holding that the union did not have standing, the Court identified the following relevant factors: (1) a causal connection between an antitrust violation and harm to the plaintiff, (2) defendants intended to cause the harm, (3) the existence of an antitrust injury, (4) the directness of a causal link between the injury and the market restraint, (5) the speculative nature of the damages, and (6) the risk of duplicate recoveries or complex apportionment of damages. *Associated General*, 459 U.S. at 536-45, 103 S.Ct. at 907-912.

It is too early to tell how the circuit courts of appeal will fashion tests of antitrust standing in light of *Blue Shield* and *Associated General*. To date, the First, Fourth, Seventh, and Tenth Circuits have not addressed the standing question in light of these two Supreme Court decisions. The Second Circuit follows *Blue Shield*. The Third Circuit has adhered to its policy balancing approach. The Sixth and Eighth Circuits have adopted the *Associated General* factors for determining standing, and the Ninth Circuit

has addressed the standing question, but with no clear resolution.[4]

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4. The First Circuit has yet to harmonize *Blue Shield* and *Associated General Contractors*. The only treatment of those two cases has been in the context of standing to suit for injunctive relief. *See, e.g., Kartell v. Blue Shield of Massachusetts*, 582 F.Supp. 734 (D.Mass.1984) (applying the *Associated General* factors by analogy to hold that doctors did not have standing to obtain an injunction against restraint of trade in the prepaid health care market and distinguishing *Blue Shield* on its facts).

One panel of the Second Circuit has aligned itself with the liberal standing approach of *Blue Shield* and distinguished *Associated General* as not limiting the application of *Blue Shield*. *See Crimpers Promotions, Inc. v. Home Box Office*, 724 F.2d 290 (2d Cir.1884) ("*Associated General* indicates no departure from *McCready* in any fashion pertinent to this case").

One panel in the Third Circuit has reaffirmed that Circuit's adherence to balancing the policies of the Clayton Act to decide the standing question instead of relying on the specific prescriptions of either *Blue Shield* or *Associated General*. *See Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (1984) (weighing the policies against double recovery and overly-complex damage claims in holding that an unauthorized dealer who purchased from an authorized dealer does not have standing to sue the manufacturer for treble damages).

The Fourth Circuit has yet to harmonize *Blue Shield* and *Associated General*, and, therefore, continues to employ the foreseeable target area approach of its decisions in *Blue Shield v. McCready*, 649 F.2d 228 (4th Cir.1981), *Ratliff v. Burney*, 657 F.2d 640 (4th Cir.1981), and *South Carolina Council of Milk Producers v. Newton*, 360 F.2d 414 (4th Cir. 1966).

The Sixth Circuit has abandoned its reliance on the zone of interests test and adopted the *Associated General* factors test to determine standing. *See Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079 (6th Cir.1983) (lessor of commercial premises did not have standing to sue a lessee for anti-competitive conduct where diminished consumer interest and activity at lessor's shopping area was unrelated to

(Continued on following page)

The Fifth Circuit follows the "target area test" where the plaintiff must show that he is within the sector of the economy threatened by the breakdown of competition. *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir.1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981); *Larry R. George Sales*

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the anti-competitive activity) and *Goldberg*, 717 F.2d 290 (6th Cir.1983) (shareholder does not have standing to bring an antitrust suit against a third party for injuries to his interest in the corporation).

The Seventh Circuit has yet to resolve the Supreme Court cases. As a result, the target area approach remains as the generally accepted measure of standing in that circuit. *See* Note, 61 Wash.U.L.Q. at 1093-94.

The approach of *Associated General* has been squarely adopted by the Eighth Circuit. *See McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1371 (8th Cir.1983) (enumerating the *Associated General* factors).

The treatment given *Associated General* by the Ninth Circuit has been inconsistent.

> [I]n *Chelson v. Oregonian Publishing Co.*, [715 F.2d 1368 (9th Cir.1983)] the court of appeals purported to apply the *Associated General* analysis, but couched its discussion solely in terms of antitrust injury. The court allowed news dealers to suit their publisher for requiring exclusive dealing agreement as a condition of news distribution. In Park v. Watson, however, the court of appeals read *Associated General* as supplementing the foreseeable target area test. These divergent readings of *Associated General* provide no consistent guidelines for antitrust standing in the Ninth Circuit.

Note, 61 Wash.U.L.Q. at 1098. *See also Solinger v. A. & M. Records, Inc.*, 718 F.2d 298 (9th Cir.1983) (prospective shareholder of an injured corporation does not have standing).

The Tenth Circuit has yet to address standing in light of the competing policies and factors of *Blue Shield* and *Associated General*. *See generally* Note, 61 Wash.U.L.Q. at 1098-99.

Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir.1979); *Donovan Construction Co. of Minnesota v. Florida Telephone Corp.*, 564 F.2d 1191 (5th Cir.1977); *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1878, 56 L.Ed.2d 389 (1978); *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977). *See also Blue Shield*, 457 U.S. at 478 n. 14, 102 S.Ct. at 2548 n. 14. Under this traditional formulation of the target area test, "even though an individual may suffer a pocketbook injury, he must be the 'target' of the anti-competitive practice before he may sue." *Pan Islamic Trade Corp. v. Exxon Corp.*, 631 F.2d 539, 546 (5th Cir.1980) (citing *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir.1975)). The traditional target area test of standing, as employed by the Fifth Circuit, requires the use of a two-step procedure. First, the court identifies the area of the economy threatened by the alleged antitrust conduct. Second, the court determines whether the plaintiff's injury is within that target area, or if the defendant "aimed" at the plaintiff. *Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d at 1359. *See also* Note, 61 Wash.U.L.Q. at 1090 n. 162 (listing cases employing the two-step procedure of the target area test).

Blue Shield and *Associated General* have had little effect on the Fifth Circuit's use and application of the target area test. In *Walker v. U-Haul Company of Mississippi*, the Fifth Circuit held that a franchisee, who was essentially an agent of the franchisor, did not have standing to sue the franchisor for violations of antitrust laws. The court gave little deference to the Supreme Court cases:

> *Associated General Contractors* rejected the 'target area' test, as well as the numerous other tests devised by various circuits to determine antitrust standing, recommending instead that 'courts should analyze each situation in light of the factors set forth' in the opinion. At [459 U.S.] 536 n. 33, 103 S.Ct. at 908 n. 33, 74 L.Ed.2d at 737. But neither that case nor *McCready* dispensed with the requirement that a section 4 plaintiff must establish an injury to competition and not merely an injury to himself. *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 303 (5th Cir. 1984). Under the facts of this case, we find that *Action Towing* [employing the target area test including the specific requirement of a showing of antitrust injury] still controls.

Walker v. U-Haul Co. of Mississippi, 734 F.2d 1068, 1073 (5th Cir. 1984) (footnotes omitted). *See Action Towing and Rental v. U-Haul International*, 507 Supp. 987 (E.D. La.1981), *aff'd* 683 F.2d 415 (5th Cir. 1982). In another case on remand from the Supreme Court for consideration in light of the *Associated General* factors, the Court stated that "we have no difficulty in reaffirming our former judgment upon the record before us." *Industrial Investment Development Corp. v. Mitsui and Company*, 704 F.2d 785, 786 (5th Cir.1980).

[3] The Eleventh Circuit has adopted the "target area" test used by the Fifth Circuit.[5] See *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 762 (11th

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5. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this circuit adopted the case law of the former Fifth Circuit handed down as of September 30, 1981. *Bonner*, 661 F.2d at 1209. *Cf. Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982) (adopting as binding precedent all post-September 30, 1981, decisions of Unit B of former Fifth Circuit).

Cir. 1983). The rule of antitrust standing in this circuit, the target area test, does not produce results materially different from the results obtained in *Blue Shield* and *Associated General*. *See Construction Aggregate Transport,* 710 F.2d at 762, 765, 765 n. 28. First, as in *Blue Shield,* we recognize that a "target" does not have to be in the same area of the market as the antitrust act; a victim is a target when located in the same area of the market affected by the antitrust act or in another area of the market "so closely related" that both may be considered targets of the same anti-competitive act. *Construction Aggregate Transport,* 710 F.2d at 764; *Blue Shield,* 457 U.S. at 479-81, 102 S.Ct. at 2548-49. Second, our test is highly responsive to the Supreme Court's policies of denying standing to plaintiffs with injuries that are too remote and whose injuries are not "the type of loss which a violation of antitrust law would be likely to cause." *Midwestern Waffles, Inc. v. Waffle House, Inc.,* 734 F.2d 705, 710 (11th Cir. 1984); *Construction Aggregate Transport,* 710 F.2d at 764, 765. *See Associated General,* 459 U.S. at 540, 103 S.Ct. at 910; *Blue Shield,* 457 U.S. at 479, 102 S.Ct. at 2548. *See also Jeffrey v. Southwestern Bell,* 518 F.2d 1129, 1131 (5th Cir.1975). Third, the Supreme Court's policy against granting standing where the possibility exists of duplicative recovery by the indirectly injured plaintiff and the more directly injured person who has yet to sue, *see Associated General,* 459 U.S. at 545, 103 S.Ct. at 912, *Blue Shield,* 457 U.S. at 475, 102 S.Ct. at 2546, has long been part of this circuit's and the former Fifth Circuit's target area test. *Construction Aggregate Transport,* 710 F.2d at 764; *Jeffrey v. Southwestern Bell,* 518 F.2d at 1131. The Supreme Court cases, therefore, provide policy guidance consistent with that which is the founda-

tion of this circuit's target area test. *See Midwestern Waffles, Inc.*, 734 F.2d at 710. *See also Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 999 (11th Cir.1983).

III. Does Amey Have Antitrust Standing?

[4] An analysis of standing requires an examination of the complaint's allegations. *Construction Aggregate Transport*, 710 F.2d at 763; *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 547 (5th Cir.1980); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1168 (5th Cir. 1979); *Yoder Brothers, Inc.*, 537 F.2d at 1359. According to Amey's complaint, Gulf Abstract and Title, Inc., is "in the business of providing real estate title services"; the law firms are in the business of practicing real estate law; and the banks are "in the business of selling financing, money and related services, including real estate title opinions, necessary for commercial real estate transactions in or about Lee County, Florida." Amey, is a corporation engaged in the business of construction, commercial investment, and real estate development. John C. Amis, Jr., is an officer and controlling shareholder of Amey and will "need in the future to purchase [the bank and law firm's] services and financing."

The complaint further alleges that the bank and law firm's anti-competitive activities included: (1) requiring "mortgage consumers to pay for legal opinions and services incident to real estate transactions fees in accord with the published fee schedule," (2) abiding by the terms of the fee schedule with the effect that "real estate legal fees in Lee County have been fixed, stabilized, and are uniform in proportion to the size of the real estate transaction in each

case," (3) entering into "exclusive dealing and tying relationships" regarding the "provision of real estate legal services," (4) agreeing that "each of the bank defendants should require mortgage financing customers" as a condition for obtaining the mortgage financing (the tying product) over which the banks jointly and inidivdually have substantial market power to purchase and pay for real estate title opinions (the tied product), (5) agreeing "that each of the bank[s] should resell and require its mortgage customers to pay (a fixed price) for the real estate title opinion submitted to the bank defendants for the mutual benefit of the banks", (6) causing to be "issued and enforced opinions of the Florida Bar Association defining the practice of law as including real estate title work, knowing that the effect of such opinions would be to preclude equally qualified nonlawyers from performing real estate title searches and related work," (7) causing the purchased property to be subject to a $32,107.52 lien, (8) inflating the "cost of real estate in Lee County," damaging "all purchasers of commercial real estate and mortgage financing in Lee County," (9) denying Amey the opportunity to "engage another person or attorney to search the title to the . . . real estate just prior to the closing of the purchase of that real estate."

To determine whether Amey has antitrust standing to sue for treble damages, we must (1) identify the market area adversely affected by the alleged antitrust activity and (2) then decide whether the alleged injury occurred within that market area. *Construction Aggregate Transport,* 710 F.2d at 762; *Yoder Brothers, Inc. v. California-Florida Plant Corp.,* 537 F.2d 1347, 1359 (5th Cir.1976).

Amey contends that the issue of its standing is controlled by *Blue Shield* which provides an expansive and

literal reading of section 4 of the Clayton Act and rejects the target area test.[6] Amey argues that the antitrust standing question is resolved by asking whether the alleged anti-competitive conduct "proximately causes" injury to plaintiff's "property, attributable to price enhancement or the reduction of competition," citing *Blue Shield*, 457 U.S. at 477, 102 S.Ct. at 2547. As a result, under this test of standing, the alleged exclusive dealing, tying, and price fixing arrangements were the proximate cause of the injuries to Amey.

The banks and law firms argue that under the target area test, Amey was not a target of the alleged anti-competitive activity. They contend, first, that the true targets of the alleged unlawful conduct are other lawyers in the Lee County area practicing real estate law, or other banks and consumers who are in an attorney-client relationship for the purpose of receiving the real estate legal services. They also contend that Amey did not suffer anti-trust injury; they argue: "Plaintiffs cannot possibly contend that the antitrust laws were intended to prevent lawyer negligence in connection with title searches." As a result they conclude that any injury caused by the lack of a final title search up to the date of closing was too remote from the alleged antitrust violations to be actionable.

A. Identification of Market Affected

Amey contends that the relevant market for consideration is the entire market of real estate legal services in Lee

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6. Amey gives little weight to precedent established by the former Fifth Circuit decisions and the specific adherence of this circuit to those decisions. *Blue Shield* does not limit the application of the target area test of antitrust standing. *See Construction Aggregate Transport*, 710 F.2d at 765-66.

County. The banks and law firms contend that the market is limited to the interaction between the providers of legal title search services and the direct consumers of those services. Our review of the allegations of the complaint lead us to hold that Amey was "within that area of the economy . . .endangered by [that] breakdown of competitive conditions." *Blue Shield,* 457 U.S. at 480, 102 S.Ct. at 2549.

The banks and law firms have economic interests in two sectors of the real estate legal services market: (1) the bank-law firm market which provides title services to banks and other direct consumers and (2) the bank-mortgagor market. The bank-law firm sector of the real estate legal services market is integrally related to the bank-mortgagor sector; *it is the mortgagor's payment of the cost of the law firm's title search services which the bank passes on to the law firm. See, e.g., Construction Aggregate Transport,* 710 F.2d at 764. The identification of the bank-law firm sector and the bank-mortgagor sector as integrally related and endangered by the alleged anti-competitive conduct is mandated by *Blue Shield.*

In *Blue Shield,* the health plan argued that the relevant market for standing purposes was the market group health care plans, and as such, standing was "limited to participants in that market . . . entities such as McCready's employer, who were purchasers of group health plans, but not to McCready as a beneficiary of the Blue Shield plan." *Blue Shield,* 457 U.S. at 479-80, 102 S.Ct. at 2549. While the Supreme Court acknowledged that McCready was not in the area of the market taken up by the group health care plans, the Court held that McCready was in a market in which she was a "consumer of psychotherapy services entitled to financial benefits under the Blue

Shield plan." *Blue Shield,* 457 U.S. at 480, 102 S.Ct. at 2549. The Court reasoned that because the harm to McCready was so clearly foreseeable and was, indeed, a "necessary step in effecting the ends of the alleged illegal conspiracy, McCready was within the market threatened by the anti-competitive conduct." *Blue Shield,* 457 U.S. at 479-81, 102 S.Ct. at 2548-2550. *See also Construction Aggregate Transport,* 710 F.2d at 764-65. In this case, Amey is not a participant in the bank-law firm title services market. It is beyond question, however, that the injury to Amey, payment of an allegedly fixed and inflated price for title search legal services, was both a "foreseeable" and "necessary" step in furthering the objective of the conspiracy. Accordingly, Amey was within the target area, the market endangered by the alleged antitrust violation.[7]

B. Injury Within Market Area

The target area test requires that Amey's injuries occur within the target area. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Amey's complaint recites that the injuries suffered as a result of the alleged anti-competitive conduct, included (1) inflated fees for title search services, (2)

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7. In its alternate holding that Amey did not have standing, the district court implicitly determined that Amey was not within the market endangered by the alleged antitrust conduct. The court agreed with the banks and law firms that the only market relevant to the standing inquiry was that of the providers of title services and the direct consumers of those services. As such, the court found, those with standing to redress the alleged antitrust violations by the appellants in this case, would be other attorneys in the Lee County area who desire to engage in the provision of title service work to the conspiring banks. The court relied on *Illinois Brick.* We do not view *Illinois Brick* as controlling.

lack of choice in selecting the provider of title search services, (3) lack of choice of obtaining mortgage financing without also obtaining the title search services provided by a particular law firm, and (4) the $32,000 lien on the purchased property due to the negligence of the title searchers. Amey argues that even if these are not "antitrust injuries," its injuries are not so remote as to designate Amey as an indirect purchaser but, rather, the injuries come under the cost-plus exception to *Illinois Brick*. The banks and law firms respond that "plaintiffs [Amey] cannot possibly contend that the antitrust laws were intended to prevent lawyer negligence in connection with title searches, which is the loss plaintiffs complain of."

Although the law firms and the banks are correct in arguing that the effects of the negligent title search do not constitute an injury which Congress intended the antitrust laws to remedy, we hold that Amey's payment of an allegedly inflated price for title search services is an injury occurring within the market endangered by the alleged anti-competitive activity. Accordingly, Amey has standing to sue for treble damages under section 4 of the Clayton Act.

The framework for understanding the issues of causation, remoteness of injury, and antitrust standing to sue for damages is provided by the common law. *Associated General Contractors,* 459 U.S. at 533, 103 S.Ct. at 906. Amey claims to have suffered a tort, negligence. *Associated General* declares:

> '[W]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation

> or his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, *unless the wrongful act is willful for that purpose.*'

Associated General Contractors, 459 U.S. at 532 n. 25, 103 S.Ct. at 906 n. 25 (quoting 1 J. Sutherland, Law of Damages, 55-56 (1882)) (emphasis added). In this case, Amey alleges injury from Henderson's negligence in providing an incomplete title search to the third party, Lee County Bank. Amey's only relationship to Lee County Bank, the third party, is contractual based on the executory contract to result in the closing. The incomplete title search increased Amey's expense of fulfilling the real estate contract. Because the faulty completion of the title search was not "willful," therefore, Amey cannot recover the injuries caused by such negligence.

[5] Amey also alleges that the antitrust violations caused it to pay for "legal fees," the cost of the title search services, which were fixed and stabilized as part of the price fixing scheme. On appeal, Amey alleges injury in having to pay a higher than competitive market price for the title search services. We recognize that "the determination of standing is a preliminary one, to be answered only from an examination of the allegations of the complaint." *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 547 (5th Cir.1980); *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148, 1168 (5th Cir.1979). Antitrust complaints are subject to the liberal pleading requirements of the federal rules, and, at a minimum, the complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.

2d 80 (1957). *See Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir.1983). Accordingly, we find that Amey's complaint alleges an injury of having to pay a higher price for title search legal services than would be necessary in an unrestrained market.

We must determine whether Amey has suffered an "antitrust injury" in having to pay an allegedly higher price for title search legal services.[8] Paying a higher price for goods or services is an injury to "property" within the meaning of section 4 of the Clayton Act. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979) "a consumer not engaged in a 'business' enterprise, but rather acquiring goods or services for personal use, is injured in 'property' when the price of those goods or services is artificially inflated by reason of the anti-competitive conduct complained of"). *See also Associated General,* 459 U.S. at 530 n. 20, 103 S.Ct. at 904 n. 20; *Blue Shield,* 457 U.S. at 473, 102 S.Ct. at 2545. Amey, therefore, suffered an injury intended by Congress to be redressed by the antitrust laws. Accordingly, we hold that Amey has standing to sue under section 4 of the Clayton Act for treble damages as it is within the market endangered by the alleged anti-competitive conduct and its injury occurred within that market.

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8. Proof that Amey actually paid a higher price or was required to pay a higher price by Lee County Bank is not necessary for a determination of standing. Preliminary litigation over these threshold questions would in effect be a trial on the merits. *See Construction Aggregate Transport,* 710 F.2d at 763 n. 24.

STATUTE OF LIMITATIONS

[6] An antitrust action must be brought "within four years after the cause of action accrues." 15 U.S.C.A. § 15b (Supp.1984). The district court determined that the only injury cognizable under the antitrust laws suffered by Amey was the payment of a fee for legal services that was allegedly inflated by defendants' anti-competitive acts. Accordingly, citing Fifth Circuit cases, the court applied the rule that an antitrust claim accrues when the "plaintiff became bound on the contract later alleged to violate the Sherman Act." *Amis,* 564 F.Supp. at 1126 (citing *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.,* 677 F.2d 1045 (5th Cir.1982), *cert. denied,* 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983); *City of El Paso v. Darbyshire Steel Co., Inc.,* 575 F.2d 521 (5th Cir.1978), *cert. denied,* 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82 (1979)). The court concluded that Amey "became bound to pay for Henderson, Franklin's legal services incidental to the loan from Lee County Bank on or before October 29, 1976, the day Henderson, Franklin issued its preliminary title opinion." The court held further that the facts of this case do not come under the exception in *Imperial Point Colonnades Condominium, Inc. v. Mangurian,* 549 F.2d 1029 (5th Cir.), *cert. denied,* 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977), and *City of El Paso.* In those cases the courts held that a cause of action "accrues" where a continuing violation occurs when a party derives "continuing benefits" from acts committed subsequent to the signing of the contract and where damage to plaintiff was incapable of precise proof at the time of the signing. *Imperial Point Colonnades Condominium,* 549 F.2d at 1035. The court found that plaintiffs' "damages arose solely

from their obligation to pay for Henderson, Franklin's services and were capable of simple calculation on the date those services were rendered. Accordingly, plaintiffs' federal and state antitrust claims are time barred having been brought over four years after October 29, 1976."

Amey denies that its cause of action accrued when it received the abstract. It argues: "Plaintiff's obligation to reimburse the legal fees was only contingent upon the bank's paying those fees, when determined." "Only if and when the bank received the law firm's completed services and was itself billed did the plaintiffs [Amey] arguably become obligated to pay the *bank*."

The guiding principles for determining when antitrust claims have accrued were laid down by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). In that case, defendant, Zenith, filed an antitrust counterclaim against Hazeltine Research alleging injury from a restraint of trade caused by Zenith's exclusion from the Canadian, British, and Australian markets because of Hazeltine's participation in patent pools in that market.

> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. . . . Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all

> damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date.

Zenith Radio Corp., 401 U.S. at 338-39, 91 S.Ct. at 806. *Zenith* contemplates that a continuing violation giving rise to a new limitations period exists when impact is felt from a conspiracy that has more than one injurious act.

The only injury alleged by Amey which is cognizable under the antitrust laws is that of the payment of the inflated fee for legal services. The district court's finding that the injury to Amey, the "impact" within the meaning of *Zenith Radio,* occurred on or before October 29, 1976, is clearly erroneous. The obligation to pay for Henderson's services could only have ripened at the time of the issuance of the preliminary title opinion if Amey had been the client of Henderson, that is, if they had privity of contract. The Florida courts have already established that Amey had no privity with Henderson. *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.*, 367 So.2d 633 (Fla.Dist.Ct.App. 1979). As a matter of contract law, therefore, the mere fact that Henderson issued the preliminary title opinion on October 29, 1976, did not obligate Amey to pay for that title opinion at that time. No evidence exists that Amey contracted with Lee County Bank to pay for the title opinion on the date of its issuance. While it can be argued, as the banks and law firms do, that Amey was aware of the issuance of the title opinion, awareness does not convert to a contractual obligation to pay for the services. Only when payment for the services became due through agreement of Amey and Lee County Bank did Amey become obligated to pay. It cannot be said, therefore, that Amey's viewing

the preliminary title opinion on October 29, 1976, vested Amey's obligation to pay for the legal services provided by Henderson.

We hold, therefore, that Amey's antitrust claims accrued at the date of closing on November 23, 1976, and that Amey's filing of the instant cause of action on November 20, 1980, was not time barred by the four-year statute of limitations.

SUMMARY JUDGMENT

The district court granted summary judgment in favor of the banks and law firms on Amey's Sherman Act section 1 claims. Those claims alleged the existence of a tying arrangement, exclusive dealing, customer allocation, price fixing, and exchange of price information agreements. The court also granted summary judgment on Amey's Sherman Act section 2 claims. Those claims alleged the existence of a monopoly and an attempt to monopolize real estate legal services and commercial mortgage financing in Lee County. The district court noted that a major element of each claim is the existence of an agreement.

Appellate review of the granting of a motion for summary judgment questions whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). When reviewing a summary judgment decision, the reviewing court is bound by the same "legal standards as those that control the district court in determining whether summary judgment is appropriate." *Thrasher v. State Farm Fire and Casualty Co.*, 734 F.2d 637, 638 (11th Cir.1984); *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991

(5th Cir. Unit A 1981). Further, it is the movant for summary judgment who bears the burden of showing that no genuine dispute exists as to any material fact. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608; *Thrasher*, 734 F.2d at 638. All reasonable doubts and inferences should be resolved in favor of the opponent. If reasonable minds differ on the inferences generated by undisputed facts, then summary judgment is inappropriate. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. Unit B 1982).

[7] Bound by these legal standards, we are mindful that "summary procedure should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Norfork Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704, 89 S.Ct. 1391, 1393, 22 L.Ed.2d 658 (1969) (quoting *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962)). We recognize, however that plaintiff carries the burden, when defendants have denied the allegations, of admitting significant probative evidence of the existence of genuine issues of fact. *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 554 (5th Cir.1980), *cert. denied*, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981).

I. Tying Arrangement Claim

Amey argues that the evidence it presented of the existence of a tying arrangement to benefit both Henderson and Lee County Bank, was a sufficient Sherman Act claim under, at least, a rule of reason analysis.

[8, 9] A tying arrangement, is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Not all tying arrangements violate section 1 of the Sherman Act. *Jefferson Parish Hospital v. Hyde,* — U.S. —, —, 104 S.Ct. 1551, 1558, 80 L.Ed.2d 2 (1984). An illegal tying arrangement has five elements: (1) "a tying and a tied product"; (2) "evidence of actual coercion by the seller that in fact forced the buyer to [purchase] the tied product"; (3) that the seller have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) "anticompetitive effects in the tied market"; and (5) "involvement of a 'not insubstantial' amount of interstate commerce in the tied product market." *Yentsch v. Texaco, Inc.,* 630 F.2d 46, 56-57 (2d Cir.1980). *See generally Jefferson Parish,* — U.S. —, 104 S.Ct. 1551.

[10] A claim that a tying arrangement is illegal per se eliminates the requirement that the plaintiff show an actual anti-competitive effect. A claim of illegality based on a rule of reason analysis requires a showing of all five elements including actual anti-competitive effect. *Jefferson Parish,* — U.S. at —, 104 S.Ct. at 1568.

[11, 12] Two *separate* products are tied together if a difference exists in the "character of the demand for

the two items." *Jefferson Parish,* — U.S. —, 104 S.Ct. at 1562 (citing *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953)). Amey claims that Lee County Bank, in agreement with Henderson, requires customers seeking mortgage financing from Lee County Bank to pay for the legal services of Henderson as well. We agree with the district court that the mortgage financing and the legal services were not purchased separately. Furthermore, the former Fifth Circuit has held that where a bank passes on to the borrower its attorney's fees pursuant to a mortgage finance transaction, such is not an antitrust violation. *See Sibley v. Federal Land Bank of New Orleans,* 597 F.2d 459, 461, 464 (5th Cir.), *cert. denied,* 444 U.S. 941, 100 S.Ct. 296, 62 L.Ed.2d 308 (1979). *See also Forrest v. Capital Buildings & Loan Assn.,* 504 F.2d 891, 891 (5th Cir.1974), *cert. denied,* 421 U.S. 478, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975) ("this method of doing business does not constitute a sale of two products or a violation of the tied product prohibition of the antitrust laws").

An additional observation is necessary regarding the tying arrangement claim. The fifth requirement for a tying arrangement claim is that a "not insubstantial" amount of interstate commerce be involved. While we have held that an individual consumer may have standing to sue on the facts involved in this case, only an individual consumer involved in a transaction with substantial impact on interstate commerce can satisfy the fifth element of the tying antitrust claim so as to survive summary judgment. *See Jefferson Parish,* — U.S. —, —, 104 S.Ct. 1551, 1560 ("if only a single purchaser were forced" with respect to the purchase of a tied item, the resultant in-

pact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby."). The $325 fee, or more specifically, the difference between the price of title services in an unrestrained market and in the alleged restrained market is not a substantial impact on interstate commerce. Accordingly, we hold that Amey has failed to carry its burden of proffering significant evidence of the existence of genuine issues of fact as to the tying arrangement claim.

II. Exclusive Dealing Claim

[13, 14] In the absence of conduct causing a restraint of trade or the effectuation of a monopoly, an individual has unfettered discretion in deciding with whom he will do business. *Moore v. New York Cotton Exchange,* 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926); *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). *See also Monsanto Company v. Spray-Rite Service Corp.,* — U.S. —, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (a manufacturer generally has a right to deal or refuse to deal with whomever it likes, as long as it does so independently). *See also Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.,* 365 F.2d 478 (5th Cir.1966). Amey alleges that Lee County Bank agreed that Henderson would supply all of its required real estate legal services. Amey does not, however, provide any evidence as to the anti-competitive effect of this exclusive dealing arrangement. Absent evidence of anti-competitive effect, Amey's exclusive dealing claim does not generate a genuine issue of fact. Accordinly, the dis-

trict court did not err in granting summary judgment on this claim.

III. Price Fixing Claim

[15, 16] Certain types of business agreements are deemed to be unreasonable as a matter of law. "A price agreement between competitors is the classic example of such an arrangement." *Jefferson Parish,* — U.S. —, —, 104 S.Ct. 1551, 1556 (citing *Arizona v. Maricopa County v. Medical Society,* 457 U.S. 332, 343-48, 102 S.Ct. 2466, 2472-75, 73 L.Ed.2d 48 (1982)).

> [F]or over forty years this Court has consistently and without deviation adhered to the principle that price fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 60 S.Ct. 811, 842, 84 L.Ed. 1129 (1939). The gravamen of the price fixing claim, therefore, is the existence of an *agreement* in which the coconspirators manipulate market prices.

[17] In its Motion in Opposition to Defendants Motions for Summary Judgment, Amey identified twelve "evidentiary acts" supporting its claims. Those relevant to the price fixing and exchange of price information claims include (1) the "periodic circulation of price lists including attorney's fee among the several defendants," (2) the law firm's "use of the same or uniform methods for arriving at charges for the various services," (3) the bank's refusal to permit attorneys other than their own

to represent borrowers, and (4) Lee County attorneys' creation of Gulf Abstract, (5) the vertical interlocking business relationships among the banks and law firms, (6) the refusal to permit other attorneys to appear and participate in a closing of the mortgage loan transaction on behalf of their client purchaser, and (7) the failure of the banks to inform the purchaser of his right to have independent legal representation in the mortgage loan transaction.

Amey argues that the prevailing rule regarding proof of price fixing in the absence of direct evidence is the offering of circumstantial evidence of parallel pricing conduct plus other factors tending to show concerted action. Amey cites as authority this circuit's decision in *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F.2d 485 (5th Cir.1982) where we interpreted the Supreme Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968), to hold that a plaintiff survives a motion for summary judgment on a claim of refusal to deal where plaintiff proffers circumstantial evidence of parallel behavior plus "other evidence besides the simple failure to deal." *Southway Theatres, Inc. v. Georgia Theatre Company*, 672 F.2d at 494 (quoting *Cities Services*, 391 U.S. at 280, 88 S.Ct. at 1588).

Southway Theatres is of little help to Amey. First, even under Amey's understanding of *Southway's* holding, the evidentiary acts recited above do not constitute "other evidence." In the *Southway* view, the phrase means "evidence other than those facts which are the foundation for [the] allegation of a refusal to deal." *Southway Theatres*, 672 F.2d at 495. All of Amey's pieces of "other evidence"

are integrally related to the allegations of its cause of action. Second, *Southway* holds that additional evidence of concerted action must be put forth, but does not suggest that the examples it includes are the only kind of acceptable additional evidence. The former Fifth Circuit construed the "other evidence" provision in *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186 (5th Cir.1978). The former Fifth Circuit interpreted *Cities Service* as requiring an additional evidentiary showing from a plaintiff who relies on cirmustantial evidence of parallel business behavior to prove concerted action.

> Proof of parallel business behavior does not establish a violation of the Sherman Act; therefore, to avoid summary judgment ASI had to come forward with significant probative evidence supporting its theory that the defendants engaged in (1) consciously parallel action, (2) which was contrary to their economic self interest so as not to amount to a good faith business judgment. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 [74 S.Ct. 257, 98 L.Ed. 273] (1954).

Aviation Specialties, 568 F.2d at 1192. *See Paul Kadair, Inc. v. Sony Corp of America*, 694 F.2d 1017, 1027 (5th Cir.1983); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 559 (5th Cir.1980). Amey has not shown through its identification of the seven evidentiary acts that the banks and law firms have acted against their "economic self-interest." The district court did not err in granting summary judgment for the banks and law firms on the price fixing claim.

IV. Exchange of Price Information

[18] Amey alleges in Count II of its complaint that the circulation of Gulf Abstract's title insurance rate

cards was an exchange of price information with the foreseeable effect of restraining trade. The district court granted summary judgment on this claim because of the absence of any evidence of an agreement. We agree with the district court.

[19] The exchange of price information among competitors is not a per se violation of the antitrust laws. *Memorial Park Cemetery Association v. Rosebrough Monument Co.*, 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1981). "Absent an agreement to fix prices, there is nothing unlawful about competitors meeting and exchanging price information or discussing problems common in their industry, or even exchanging information as to the cost of their product." *Rutledge v. Electric Hose and Rubber Co.*, 327 F.Supp. 1267, 1272 (C.D.Cal.1971), *aff'd* 511 F.2d 668 (9th Cir. 1975). *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Amey provides no evidence other than the evidentiary acts identified earlier, including the circulation of the Gulf Abstract title insurance card. As we found in the previous discussion of the price fixing claim, Amey's evidentiary acts are insufficient to raise a reasonable inference of the existence of a genuine issue of fact that appellees engaged in concerted horizontal activity.

PREMATURE TERMINATION OF DISCOVERY CLAIM

[20, 21] Amey contends that the district court improperly limited discovery and, therefore, precluded it from discovering adequate evidence to oppose the motion for summary judgment. *See Pan-Islamic Trade Corp. v.*

Exxon Corp., 632 F.2d 539, 548 (5th Cir.1980). *See also First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). Review of the record makes it apparent that Amey was provided more than an adequate opportunity to engage in discovery on all issues raised in its complaint and to bring motions to compel answers and the production of documents. A trial court has wide discretion in determining the scope and effect of discovery. *Pan-Islamic Trade Corp.*, 632 F.2d at 550. In light of the nature of the cumulative and vague allegations in this case, the district court did not abuse its discretion in curtailing discovery pending its hearing on the motions for summary judgment.

The complaint in this case was filed on November 20, 1980. The banks and law firms answered in a timely fashion. Amey thereupon propounded its first set of interrogatories. The general response from the banks and law firms was that these interrogatories were vague and oppressive. Amey then filed a motion to compel answers to its first set of interrogatories and to compel production of documents. This motion was heard by the district court on June 25, 1982. At this hearing, Amey explained that the theory of its case was "market control by the collective actions of the several defendants in concert one with the other thereby, of course, precluding bona fide competition and excluding others from the ability to engage in this market freely." Amey argued that the unanswered interrogatories would reveal the "identity of material witnesses as it bears upon monopolization as well as conspiracy." The banks and law firms responded that throughout the eighteen months since the filing of the complaint, Amey's discovery failed to reveal any evidence in-

dicating the existence of a conspiracy agreement, an element essential to all the claims. In response to interrogatories propounded by the Lee County Bank, Amey identified T. Rankin Terry, a lawyer in Lee County, as a source of evidence of the existence of a conspiracy agreement. Terry, deposed over a period of two and one-half days, denied any knowledge of the existence of a conspiracy. Amey disputed this assertion, and explained that, indeed, Terry testified that he had "common knowledge" that exclusive agreements existed between the banks and the law firms. The banks and law firms noted that they had conceded for the purposes of summary judgment the existence of parallel prices and parallel processing of commercial mortgages. Nonetheless, in their view, no basis existed for finding that Amey's interrogatories would reveal the existence of such an agreement, especially where Amey's star witness denied actual knowledge of the existence of such an agreement. The district court denied Amey's motion to compel discovery, stayed all discovery except depositions that had already been noticed, and scheduled a date for hearing on the summary judgment motions.

[22] A party does not have an unlimited right to discovery prior to a hearing on a motion for summary judgment.

> When the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case and that such discovery is not likely to produce a genuine issue of material fact, discovery should be ended. *Universal Brands, Inc. v. Philip Morris, Inc.*, 546 F.23d 30, 36 (5th Cir.1977); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1145 (5th Cir.1973).

Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1190 (5th Cir.1978).

The district court was correct in suggesting that the gravamen of Amey's theory of the case is the existence of an agreement. Amey seeks to discover additional circumstantial evidence of concerted activity, but is unable to identify any additional evidence to be obtained through discovery. Amey argues that the object of the interrogatories was to discover the names of people who were witnesses to the concerted practices. This objective, in Amey's view, is achieved by interrogatories requesting specifics about commercial real estate sales closings. As the district court noted, the most that can be obtained through these interrogatories is mere cumulative evidence of parallel pricing and processing, matters which the banks and law firms have conceded. We hold that the district court did not abuse its discretion in curtailing discovery pending a hearing on the motions for summary judgment.

ATTORNEY'S FEES

Subsequent to the grant of summary judgment as to all of Amey's claims, the banks and law firms moved in district court to have attorney's fees awarded against Amey under 28 U.S.C.A. § 1927 (Supp. 1984) and Fla.Stat. § 57.105 because Amey initiated and conducted its litigation in bad faith.[9] The claim of bad faith is based on

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9. Title 28 U.S.C.A. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreason-

(Continued on following page)

Amey's (1) suing many entities when damages were only $325, (2) pursuing the same claims in federal court that were resolved against Amey in the state court, (3) initiating litigation based on the hearsay statements of Terry as to the existence of a horizontal agreement among the banks and law firms, and continuing the litigation even after Terry admitted having no actual knowledge of the existence of an agreement, (4) rejecting settlement offers, (5) inclusion of Exchange Bank as a defendant based only on the mistaken belief that it was one of the four top banks in Lee County, and the decision not to drop Exchange Bank from the suit when it was discovered that Exchange Bank is not of the four top banks, (6) suing the wrong law firm, Alderman and Taminosian, and the decision not to drop the law firm from the suit when it was discovered that the "Frank Alderman" to whom T. Rankin Terry referred in his discussions with Amey was deceased, and (7) pressing of the baseless claim that the banks and law firms improperly participated in promulgation of supreme court rules placing the provision of title services within the restrictions of authorized practice of law. The banks and law firms contend that the district court abused its discretion in failing to tax attorney's fees against Amey un-

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> ably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct.

Fla.Stat. § 57.105 provides:

> The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the court finds that there was a complete absence of a justicable issue of either law or fact raised by the losing party.

der section 1927, the bad-faith exception, and Fla.Stat. § 57.105.

[23] The application of section 1927 to this case is controlled by the Supreme Court's decision in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). In *Roadway Express,* attorneys for plaintiffs in a civil rights class action against a Louisiana corporation failed to comply with district court orders relating to discovery and the filing of briefs. The district court read "costs" in section 1927 as including the award of attorney's fees "as part of the costs" of litigation contemplated by 42 U.S.C.A. §§ 1988 and 2000e-5(k). The Fifth Circuit reversed, and the Supreme Court held that attorney's fees are not includable as "costs" under 28 U.S.C.A. § 1927. The Court held, nonetheless, that in certain circumstances, a district court has the inherent power to award attorney's fees:

> [T]he general rule in federal courts is that a litigant cannot recover his counsel fees. *See Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S., [240] at 257, 44 L.Ed.2d 141, 95 S.Ct. 1612. But that rule does not apply when the opposing party has acted in bad faith. In *Alyeska* we acknowledged the 'inherent power' of courts to
>
> > assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant . . . or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . . [*Alyeska Pipeline,* 421 U.S. at 258-259 [95 S.Ct. at 1622]]. . . .
>
> The bad faith exception for the award of attorney's fees is not restricted to cases where the action is filed in bad faith. " '(B)ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." [Citation omitted.]

Roadway Express, 447 U.S. at 765-66, 100 S.Ct. at 2464. This circuit adheres to the *Roadway Express* principle that "in narrowly defined circumstances, federal courts have inherent power to assess attorney's fees against counsel." *Durrett v. Jenkins Brickyard, Inc.,* 678 F.2d 911, 918 (11th Cir.1982). *See Rothenberg v. Security Management Co.,* 736 F.2d 1470, 1471 (11th Cir.1984).

[24] Once having granted summary judgment on the federal claims, the district court also granted summary judgment on the state claims on generalized principles of estoppel. The banks and law firms claim that they should be awarded attorney's fees because Amey's cause of action was completely absent of a "justiciable issue of either law or fact." Florida courts have consistently held that in order for an action to be devoid of merit so as to not have a justiciable issue the claims must be "frivolous." *Nunes v. Margate General Hospital, Inc.,* 435 So.2d 916 (Fla.Dist. Ct.App.1983); *Cusick v. Condominium Marketing Consultants, Inc.,* 434 So.2d 25 (Fla.Dist.Ct. App.1983); *Angora Enterprises v. Condominium Association of Lakeside Village, Inc.,* 432 So.2d 792 (Fla.Dist.Ct. App.1983); *Southeast First Leasing, Inc. v. Koontz,* 431 So.2d 333 (Fla.Dist.Ct.App.1983); *Strothman v. Henderson Mental Health Center, Inc.,* 425 So.2d 1185 (Fla.Dist. Ct.App.1983). The trial court must make a specific finding of "complete absence of a justiciable issue of either law or fact" or face reversal or remand on the award of attorney's fees. *Whitten v. Progressive Casualty Insurance Co.,* 410 So.2d 501, 505 (Fla.1982); *Apgar & Markham Construction v. Macasphalt, Inc.,* 424 So.2d 41 (Fla.Dist. Ct.App.1982). *See also Burger King Corp. v. Mason,* 710 F.2d 1480 (11th Cir.1983).

[25] The banks and law firms also claim an entitlement to attorney's fees under Florida law because Amey initiated and conducted the litigation in bad faith. The bad faith exception to the American rule that parties bear their own costs, including attorney's fees, applied to the federal courts by *Roadway Express,* is not recognized in Florida jurisprudence. *Department of Revenue of the State of Florida v. Arga Co.,* 420 So.2d 323 (Fla.Dist.Ct. App.1982). In *Arga,* the state of Florida failed to obey a court order compelling discovery. The state suffered a default judgment and the prevailing party received attorney's fees based on the state's bad faith litigation. The Fourth District Court of Appeals of Florida reversed. While regarding the applicability of *Roadway Express's* bad faith exception to state courts, it explained:

> To our knowledge, no Florida appellate court has addressed the question of whether Florida follows the 'bad faith' exception to the general rule that a litigant cannot recover his counsel fees.

The Fifth Circuit, however, did address the question in *Perkins State Bank v. Connolly,* 632 F.2d 1306 (5th Cir. 1980). There, the court held:

> [Florida does] not accept the federal 'bad faith' exception to the American rule. To be sure, the Florida Supreme Court has recognized that a limited right to recover attorney's fees may exist in cases of 'fraud or malice':
>
> > The right to recover attorneys' fees as part of the costs did not exist at common law. It must be provided by statute or contract. Fraud or malice may modify the rule under circumstances.
>
> This exception has been narrowly interpreted and seems limited to cases where the fraud or malice is 'specific, certain and conclusive.'

> . . . More importantly, this exception does not appear to allow attorney's fees as an element of costs.
>
> *Id.*, at 1311-12 (citations omitted). We concur with the foregoing analysis.

Department of Revenue of the State v. Arga, 420 So.2d 323, 324 (Fla.Dist.Ct.App.1982), *petition for review denied,* 434 So.2d 886 (Fla.1983).

Review of the attorney's fees issue requires that we determine whether, as to the federal antitrust claims the banks and law firms are entitled to costs, identified in 28 U.S.C.A. § 1920, under section 1927 because Amey "unreasonably and vexatiously" multiplied the costs of the proceedings, or whether Amey is entitled to attorney's fees under the bad faith litigation exception of *Roadway Express.* As to the state anti-trust claims, we must determine whether the banks and law firms are entitled to attorney's fees under Fla.Stat. § 57.105 because Amey's cause of action demonstrated "a complete absence of a justiciable issue of either law or fact," or under the "fraud or malice" exception recognized by Florida law.

The banks and law firms identified seven circumstances which they contend support a finding that the trial court abused its discretion in denying the award of attorney's fees.

I. Scope of Damages.

[26] The banks and law firms contend that because the only alleged injury to Amey is the $325 fee for the services of Henderson, proceeding to court with such a minimal injury constitutes bad faith. Nowhere in Section 4 of the Clayton Act is a minimal injury requirement men-

tioned. Congress has specifically declined to require any threshold level for a jurisdictional "amount in controversy." *See* 15 U.S.C.A. § 15(a) (Supp.1984). Accordingly, while the actual amount of the injury might be relevant to the ability to show anti-competitive effect under a rule of reason analysis, *see Jefferson Parish,* — U.S. —, 104 S.Ct. 1551, 80 L.E.2d 2 (1984), the dollar amount of the injury alleged is not relevant to the grant of attorney's fees.

II. Res Judicata.

The banks and law firms also claim that Amey's suit was barred by the prior litigation of the same claims in the state court. In the state proceeding, Amey sued Henderson and its insurer, Gulf Insurance Company, claiming damages of $2,500 for Henderson's negligence in not detecting the lien placed on the Hogue property by the Internal Revenue Service. The circuit court granted summary judgment against Amey, finding that "no attorney-client relationship existed" between Henderson and Amey and that Henderson "owned no legal duty" to Amey. The Second District Court of Appeals of Florida held (1) that Amey was not a third-party beneficiary of the contract between Lee County Bank and Henderson and (2) the transaction with Lee County Bank did not create an attorney-client relationship between Henderson and Amey. *Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A.,* 367 So.2d 633 (Fla.Dist.Ct.App.1979). In its complaint in this case, Amey claims an injury of $35,000 based on a variety of antitrust violations caused by a number of banks, law firms, in addition to Henderson, and a title insurance company.

[27, 28] The threshold question in deciding whether the trial court abused its discretion in failing to grant attorney's fees under the various standards based on relitigation of an already decided cause of action is whether the federal doctrine of *res judicata* or that of Florida is to control. Where the first suit is brought in state court and the second suit is brou g in federal court based on diversity, state law of *res judicata* is to be applied. *Commercial Box & Lumber v. Uniroyal,* 623 F.2d 371, 373 (5th Cir. 1980); *Cleckner v. Republican Van & Storage Co.,* 556 F.2d 766, 768 (5th Cir. 1977). Similarly, when a federal court exercises federal question jurisdiction and is asked to give *res judicata* effect to a state court judgment, it must apply the "*res judicata* principles of the law of the state whose decision is set up as a bar to further litigation." *Hernandez v. City of Lafayette,* 699 F.2d 734, 736 (5th Cir.1983) (citing *ED Systems Corp. v. Southwestern Bell Telephone Co.,* 674 F.2d 453, 457 (5th Cir.1982)). *See Marrese v. American Academy of Orthopaedic Surgeons,* — U.S. —, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). *See also St. John v. Wisconsin Employment Relations Board,* 340 U.S. 411, 71 S.Ct. 375, 95 L.Ed. 386 (1951); *Rollins v. Dwyer,* 666 F.2d 141 (5th Cir.1982). The Florida doctrine of *res judicata* bars subsequent litigation where there is (1) identity of the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the actions, and (4) identity of the quality or capacity of the person for or against whom the claim is made. *Stevens v. Len-Hal Realty, Inc.,* 403 So.2d 507, 508 (Fla.Dist.Ct.App.1981); *Seaboard Coastline Railroad v. Industrial Contracting Co.,* 260 So.2d 860 (Fla.Dist.Ct.App.1972).

[29] The first requirement is satisfied. In the prior action, Amey sued for $2,500 in damages. In this action, Amey sues for $35,000 in damages. Identity of the thing sued for exists—damages. *See Valdes v. Ruiz,* 354 So.2d 1269 (Fla.Dist.Ct.App. 1978).

There is not, however, identity of cause of action. For that second requirement to be satisfied, the law

> requires . . . that the claims or causes of action be substantially the same. . . . Identity of causes of action is defined by similarity of the facts essential to the maintenance of both actions. *Gordon v. Gordon,* 59 So.2d 40 (Fla.1952); *Smith v. Florida East Coast Railway Company,* 151 So.2d 70 (Fla. 3d DCA 1963).

Pumo v. Pumo, 405 So.2d 224, 226 (Fla.Dist.Ct.App.1981). In the state court action, the essential facts focused on the reliance of Amey on the title opinion prepared by Henderson. The second action, however, included not only the facts of Amey's reliance, but focused more on the existence of an "agreement" among the banks and the law firms in Lee County to restrain the trade in title services. The proof of an agreement was not "essential" to the maintenance of a negligence action in the first state action, but is indispensable to Amey's antitrust action.

We hold, therefore, that the Florida doctrine of *res judicata* does not bar this action begun in federal court, and the district court did not abuse its discretion in failing to grant attorney's fees under the various standards.[10]

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10. The identity of the persons and parties to the action is easily satisfied on these facts. Henderson was the defendant in the first action and is also the major defendant in the second action, since without the services of Henderson, Amey

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III. Remaining Circumstances.

None of the remaining circumstances, either individually or together, support a finding of bad faith, vexatiousness, complete absence of a justiciable issue, or fraud, or malice. We agree with the view of the district court that Amey was entitled to an opportunity to substantiate its case for only so long as a reasonable expectation existed that it could do so. In reviewing the conduct of this litigation, we must be mindful of the exigencies under which all parties labor and of which the district court was aware when it ruled on the motion for award of attorney's fees.

> I do not find that the plaintiffs—that the defendants are entitled to recover attorneys' fees against counsel for the plaintiffs, either one of them, or to recover for any excess costs against either. While, as I say, the case was a kind as might be vexing, it was not vexatiously brought, nor was it brought without some basis. I do not find that there was a complete absence of justiciable issue of law and fact.

[30] We hold that the district court did not abuse its discretion in failing to grant an award of attorney's fees against Amey or its attorneys.

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would not have suffered its alleged injury. Similarly, parties in the second action have maintained a similar identity of capacity as those in the first action: Amey was the mortgagor in both actions and the first action had as defendants the Henderson law firm, while the second action has as defendants laws firms and banks providing mortgage financing.

CONCLUSION

This case presents the model of a single consumer in a large market striving to substantiate its belief that it has been the victim of illegal, anti-competitive conduct. Although Amey was a mere consumer, it had standing to bring these antitrust claims. While its economic interests were in a separate area of the market from that of the banks and law firms, Amey's interests were necessarily intertwined with those of the banks and law firms. Therefore, Amey suffered an injury within the target market. Amey's inability to demonstrate existence of a genuine issue of fact does not suggest that its claims were frivolous but demonstrates the almost inherent inability of a single consumer, only having access to information to which consumers are usually given access, to litigate an antitrust claim effectively. While mindful of Amey's good faith efforts to substantiate its claims, and having found that Amey's claims were not barred by the statute of limitations, we hold that (1) the district court did not abuse its discretion in granting summary judgment for the banks, law firms, and other parties sued on the tying, exclusive dealing, price fixing, customer allocation, and exchange of information claims, and (2) the district court did not abuse its discretion in denying motions for award of atorney's fees.

Accordingly, the district court is affirmed in both appeals.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-88 Civ-Ft.M-K

JOHN C. AMIS JR., et al.,

Plaintiffs,

vs.

GULF ABSTRACT & TITLE, INC., et al.,

Defendants.

ORDER

This is an antitrust action brought under sections one and two of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and under the Florida Antitrust Act, Fla. Stat. Ch. 542 (1981), in which plaintiffs seek damages and injunctive relief under sections four and six of the Clayton Act. 15 U.S.C.A. §§ 15, 26 (Supp. 1982). The complaint alleges certain conduct of several of the major banks and law firms in the Fort Myers, Florida area, and describes various theories under which this conduct assertedly violated the antitrust laws. Substantial discovery was conducted, including a great many depositions taken by plaintiffs during 1981 and early 1982. Defendants began filing motions for summary judgment in early 1982, and, with certain specified exceptions, discovery was stayed by order of the Court on June 25, 1982. Plaintiffs were directed to and did respond to the motions for summary judgment, and the Court heard oral argument.

The sad history of this dispute should be briefly stated. Amey, Inc. is a closely held corporation of which John Amis is president. In 1976, Amey contracted to pur-

chase certain real property and approached Lee County Bank to arrange financing. According to plaintiffs, the bank's willingness to make the loan was conditioned upon Amey's agreement "to purchase a real estate title search and opinion" from the defendant Henderson, Franklin, Starnes & Holt, P.A. (Henderson, Franklin), or "to pay $325 for the search and opinion, which would be given by [Henderson, Franklin]." Complaint ¶ 34. Amey agreed, and the bank requested a title opinion from the Henderson, Franklin firm. On October 29, 1976, the firm rendered its preliminary opinion covering the period to and including October 10, 1976. The loan was closed and the property purchased on November 23, 1976, but, unknown to the parties, the Internal Revenue Service had filed a tax lien against the property on November 3, 1976. Neither plaintiffs nor the bank had requested an update on Henderson, Franklin's title opinion. The bank charged Amey, as borrower, the $325 fee it paid to Henderson, Franklin for the title work.

In late 1977, Amey filed an action in state court against Henderson, Franklin and its malpractice insurance carrier, alleging that the firm was negligent in failing to discover the tax lien. The trial court granted the defendants' motion for summary judgment, concluding that the firm owed a duty of care to the bank as its client, but owed no duty to Amey as an alleged third-party beneficiary. That view was upheld on appeal:

> It may be that in transctions such as this the buyer often chooses to rely on the expertise of the lender's lawyer on the premise that the lawyer would not approve the title for a loan unless the title were clear. However, this is a calculated risk, and if it proves to

> be unfounded, the buyer has no claim that the lawyer violates a duty owed to him . . . . The fact that the buyer had to pay the law firm's fee did not establish a lawyer-client relationship.

Amey, Inc. v. Henderson, Franklin, Starnes & Holt, P.A., 367 So.2d 633, 635, (Fla. App.), *cert. denied*, 376 So.2d 68 (Fla. 1979).

Amey and Amis filed this action just over a year after the Florida Supreme Court denied certiorari in the state litigation. In count one of their complaint, plaintiffs allege that "defendants and their co-conspirators" engaged in price-fixing by circulating and adhering to a "printed uniform fee schedule for real estate legal services." This conspiracy allegedly injured plaintiffs because of its inflationary effect on the "price for legal services and all mortgage financing" since 1976. Count two contains essentially the same allegations, but is headed "Exchange of Price Information."

Counts three through six contain challenges to the relationships allegedly, in effect between each bank and its putative law firm partner. In count three, plaintiffs contend that defendants Lee County Bank and Henderson, Franklin—the two with whom they dealt in 1976—have engaged in an illegal tying arrangement by which all those purchasing mortgage financing from the bank were "required to purchase and pay for title services and title opinions provided by Henderson [,Franklin] at inflated prices." Plaintiffs also complain that this arrangement "foreclose[s]" other attorneys from Lee County Bank's "30% share of the market for commercial legal title work and 20% share of all legal title work and mortgage fi-

nancing in Lee County;" count four contains the same allegations, but is headed "Exclusive dealing."[1] Next, plaintiff again challenges the "illegal tying arrangement between Lee County Bank and Henderson, Franklin, this time suggesting that the relationship contained aspects of resale price maintenance. Finally, in count six, plaintiffs contend that the several law firm-bank relationships result from an agreement among the firms not to advertise or otherwise compete to do work for any bank other than their respective "partner." The banks allegedly also conspired not to deal with any firm other than their respective "partner." In each of these claims, plaintiffs allege injury in that the price for title work has been inflated.

Count seven comprises plaintiffs' claim that the defendant law firms and certain "unnamed co-conspirators"

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[1] At best, plaintiffs have only questionable standing to raise this second aspect of the claim in count three and the whole of count four, for if anyone suffered directly from the alleged exclusive dealing arrangement it was other attorneys in the area. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977); *cf. Forrest v. Capital Buildings & Loan Ass'n*, 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975) (similar practice challenged by lawyers excluded). Moreover, Henderson, Franklin acted as the bank's attorney; plaintiffs paid their fee only because they undertook to do so in negotiations with the bank. These plaintiffs' relationship to the alleged exclusive dealing violation—or to many of the other alleged violations—was therefore even more distant than was the state of Illinois' to the block manufacturers' price-fixing scheme in *Illinois Brick*. *Cf. Amey, Inc. v. Henderson, Franklin*, 367 So.2d 633 (indicating distance between plaintiffs and legal services in question). Because legal insufficiency of the tying and exclusive dealing claims is so well decided, and because the absence of an agreement is so clear on the record, the Court will not rest solely on plaintiffs lack of standing.

have agreed "without the express approval of the State of Florida to cause the services of real estate title searching and describing and opinions to be included within the definition of 'the practice of law,' as recognized in the State of Florida." Complaint ¶ 88. The alleged effect of this "combination" was "to boycott and refuse to deal and cause the refusal to deal by defendant banks and others with persons who are capable of and would be desirous of performing real estate title searches in competition with defendants in Lee County but who are not members of the Florida Bar." *Id.* ¶ 89.

Finally, counts eight and nine draw all the preceeding alleged antitrust violations together and assert that they were the means by which the defendants—banks and firms —sought to monopolize "the practice of real estate legal services and commercial mortgage financing" in Lee County. *Id.* ¶ 92. Count eight alleges monopolization and Count nine attempt to monopolize.

I. *The Statute of Limitations.*

The standard to be applied in considering summary judgment on limitations grounds is the familiar one: the motion is to be granted if the pleadings, discovery, and the documentation supporting the motion reveal no "genuine issue of material fact" and indicate "that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A properly supported motion for summary judgment cannot be resisted on mere allegations alone, for such a motion "pierces" the pleadings and tests whether the factual dispute is "genuine." *Joe Regueira v. American Distilling Co.*, 642 F.2d 826, 829 (5th Cir. 1981).

An antitrust action must be brought "within four years after the cause of action accrued." 15 U.S.C.A. § 15b (1973 & Supp. 1982).[2] The traditional rule is that an antitrust action accrues when the alleged consipracy or other antitrust violation has an impact on the plaintiff. "[I]f a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339, 91 S.Ct. 795, 806, 28 L.Ed.2d 77 (1971).

Plaintiffs contend that the limitations period did not begin to run in this case until the date of the closing, November 23, 1976; as they put it, that was "the first time at the very least that the Plaintiffs would have had occasion to be made aware of the existence of [the tax lien] were it not for the omission and/or negligence of those responsible for furnishing accurate title information." Memorandum, August 17, 1982, at 23.[3] But plaintiffs' claim that

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2 The Clayton Act's limitations provision was amended in a way irrelevant to this cause on September 30, 1976. *See* Pub. L. No. 94-435, Title III, § 302(1), 90 Stat. 1396.

Florida applies the same period to its private antitrust action as the federal statute. Fla. Stat. 95.11(3)(f) (1981). No party has suggested any reason why the limitation analysis might differ under state and federal law. It does not. *See id.* §§ 542.20, 542.32.

3 Similarly, in their memorandum in opposition to summary judgment, plaintiffs contend that they were "victims of the antitrust conspiracy . . . because if they had been permitted to use their own attorney the tax lien would have been discovered." Memorandum, August 17, 1982, at 2. *But see* text accompanying notes 15-16, *infra*.

Henderson, Franklin was negligent in failing to discover the IRS tax lien prior to closing has been thoroughly litigated, *see Amey, Inc. v. Henderson, Franklin, supra*, and is not now to be transformed into an antitrust claim. If plaintiffs suffered any injury cognizable under the antitrust laws, it was having to pay a fee for legal services that was inflated by the allegedly anticompetitive acts of defendants. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).[4] The issue, then, is when their claim for that alleged injury arose.

Both the old and the new Fifth Circuits have concluded that an antitrust claim is barred if brought over four years after the plaintiff became bound on the contract later alleged to violate the Sherman Act. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1373 (5th Cir. 1982), *cert. denied*, — U.S. —, 103 S.Ct. 729 (1983); *City of El Paso v. Darbyshire Steel Co., Inc.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121, 99 S.Ct. 1033, 59 L.Ed.2d 82 (1979). It is clear, and plaintiffs do not bother to dispute, that they became bound to pay for Henderson, Franklin's legal services incidental to the loan from Lee County Bank on or before October 29, 1976, the day Henderson, Franklin issue its preliminary title opinion. Complaint ¶¶ 33, 34, 43; 2 Amis Depo. 20-21. *See Minskie's Follies of Florida, Inc. v. Sennes*, 206 F.2d 1, 4 (5th Cir. 1953) (applying Florida law). This case does not come within the exception in *Imperial Point Colonnades Condominium, Inc. v. Mangurian*, 549 F.2d 1029 (5th

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[4] *Cf.* note 1, *supra*.

Cir.), *cert. denied*, 434 U.S. 859, 98 S.Ct. 185, 54 L.Ed.2d 132 (1977) and *City of El Paso*, for plaintiffs' damages arose solely from their obligation to pay for Henderson, Franklin's services and were capable of simple calculation on the date those services were rendered. Accordingly, plaintiffs' federal and state antitrust claims are time-barred, having been brought over four years after October 29, 1976.

II. *The Merits.*

A. *Appropriateness of Summary Judgement on the Merits.*

In 1962, the Supreme Court expressed the view that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) (footnote omitted). Six years later, the Court reintroduced Rule 56 into antitrust litigation: "To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations, we decline to accept it." *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968). Issues of motive and intent—so prevalent in *Poller*—were not central in *Cities Service* and are not in this case, for both that case and this turn on more objectively determin-

able issues, such as whether a conspiracy existed in the first instance. *Cities Service*, 391 U.S. at 289, 88 S.Ct. at 1593. *See Solomon v. Houston Corrugated Box Co.*, 526 F.2d 389, 395 (5th Cir. 1976).

Plaintiffs insist that summary judgment is inappropriate at this stage of the litigation because they have been afforded an inadequate opportunity for discovery. This case was filed November 20, 1980, and substantial discovery ensued. In the next year and a half, plaintiffs deposed many witnesses, including at least one senior officer or member of each defendant. Finally, on May 19, 1982, defendant Exchange Bank of Lee County moved to stay further discovery pending resolution of its and the other defendants' motions for summary judgment. The Court heard oral argument on Exchange's motion on June 24, 1982. At that time, defendants conceded for the purpose of their pending motions for summary judgment that the markets to which plaintiffs' complain refers exhibited parallel prices and pricing behavior. In light of that concession, plaintiffs completely failed to specify what relevant evidence was likely to be revealed upon further discovery.[5] The Court therefore granted defendant's motion to stay further discovery; plaintiffs were allowed to proceed with several depositions as to which notices were then pending. Order, June 25, 1982. The Court was and remains convinced that plaintiffs have been afforded more than enough time to obtain discovery on the issues central to

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[5] When asked specifically why he needed response to several pending interrogatories, plaintiffs' counsel replied that they were necessary "because they are designed to develop the actual facts as they then existed." Tr. of Hearing, June 24, 1982, at 18.

this case. *See Aviation Specialties, Inc. v. United Technologies Corp.*, 586 F.2d 1186, 1190 (5th Cir. 1978).

B. *Insufficiency of the "Pairing" Claims.*

Plaintiffs claim that the alleged "tying" or "exclusive dealing" arrangement between Lee County Bank and the Henderson, Franklin firm violated federal antitrust statutes.[6] Even if plaintiffs had standing to assert the exclusive dealing claim,[7] the arguments are substantively without merit. The Fifth Circuit long ago upheld over an antitrust challenge the practice of savings and loan associations "in requiring [their] borrowers to pay the legal fees of attorneys selected by the savings and loan association to examine titles for it, render title opinions to it, and prepare the necessary security agreements" when lending their money. *Forrest v. Capital Buildings & Loan Association,* 504 F.2d 891 (5th Cir. 1974), *cert. denied,* 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975). That holding and those that followed have been based on the elementary notion that persons and institutions have the right to employ counsel of their own choice, and the principle remains, even when a bank succeeds as part of its mortgage loan transactions in passing its attorney's fee directly on to the borrower. *E.g. Sibley v. Federal Land Bank of New Orleans,* 597 F.2d 459, 461, 464 (5th Cir.), *cert. denied,* 444 U.S. 941, 100 S.Ct. 296, 62 L.Ed.2d 308 (1979). *See Foster v. Maryland State Savings & Loan Association,* 590 F.2d 928 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 S.Ct.

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[6] The claim that these bank-law firm pairings were the subject of a horizontal market division agreement is discussed in section II(c), *infra.*

[7] See note 1, *supra.*

L.Ed.2d (1978). For that and other reasons,[8] plaintiffs' claims of illegal tying and exclusive dealing are clearly without merit.

C. *No Evidence of an Agreement.*

Plaintiffs go beyond the situations in *Forrest, Foster,* and *Sibley,* however, by adding to their "pairing" claims allegation of a horizontal agreement among some or all of the defendants. Counts one and two, titled "Price Fixing" and "Exchange of Price Information," involve claims sounding under section one of the Sherman Act, 15 U.S.C. § 1. Similarly, plaintiffs allege in count six that defendants—both banks and law firms—conspired to allocate markets for "real estate legal services" by establishing and adhering to "bilateral relationships" between each bank and a particular law firm.[9] Count seven also purports

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[8] *See, e.g. United States Steel v. Fortner Enterprises,* 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed.2d 80 (1977); *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 5-6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Plaintiffs have failed even to suggest any way in which Lee County Bank enjoyed any "advantage not shared by [its] competitors in the market" for mortgage loan financing. *Fortner,* 429 U.S. at 620, 97 S.Ct. at 868. Additionally, there was no "purchase" of separate products in this case. *Foster,* 590 F.2d at 931.

[9] This claim makes remarkably little sense with regard to the bank defendants, for the only possible economic effect of such an agreement would be to raise their costs by elevating the fee for title opinions incidental to mortgage loans. Viewed from the law firms' perspective, however, the substantive claim in count six is more plausible; their alleged agreement to work only on loans involving their respectively assigned bank "partner" would serve their economic interest by achieving a market division by bank, rather than along the more usual geographic lines. However it is viewed, count six presupposes an agreement, at least among the law firm defendants.

to state a claim under section one. Count eight, however, claims a violation of section two, 15 U.S.C. § 2; in it, plaintiffs allege that all defendants conspired to "monopolize the practice[s] of real estate legal services and commercial mortgage financing in Lee County." *See American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946).[10] Each of these claims require allegation and proof of an agreement among the relevant defendants, *see United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Scranton Construction Co. v. Litton Industries Leasing Corp.*, 494 F.2d 778, 782 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079, 95 S.Ct. 774, 42 L.Ed.2d 800 (1975) (quoted in *Solomon*, 526 F.2d at 394), and each must be measured with the *Forrest-Foster-Sibley* holdings well in mind.

"When faced with defendants' sworn denial of the existence of a conspiracy, it is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists as to this element of the complaint." *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 554 (5th Cir. 1980), *cert. denied*, — U.S. —, 102 S.Ct. 427 (1981); *see Cities Services*. The appropriate standard has been recently stated:

> If reasonable inferences drawn from all the evidence—which must be viewed in the light most favorable to

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10 Count nine comprises plaintiffs' claim that each individual law firm defendant has, by the acts alleged in counts one through eight, attempted to monopolize "the practice of real estate legal services in Lee County." How plaintiffs propose to show a dangerous probability of success is unclear in light of the allegations in count six, but the claim does not require allegation of an agreement and is therefore not discussed in this section.

> the plaintiff—indicate the existence of a conspiracy, the plaintiff has introduced a sufficient basis for proceeding to trial. The ultimate inference that a conspiracy existed need not be more probable than the inference that the [suspect conduct] resulted from independent business judgment. "Where more than one reasonable inference can reasonably be drawn from the proof, it is for the jury to determine the proper one." *Bordonaro Brothers Theatres v. Paramount Pictures*, 176 F.2d 594, 597 (2d Cir. 1949). Where the additional evidence put forward by the plaintiff is not sufficiently probative, though, the plaintiff's desired inferences fail when measured against "the abstract standard of reasonableness." There is, in such a case, no genuine issue of material fact. *See generally, e.g., Solomon* [, 526 F.2d at 393-94].

Southway Theatres, Inc. v. Georgia Theatres Co., 672 F.2d 485, 495 (5th Cir. Unit B 1982).

The record in this case is replete with defendants' sworn denials of any of the agreements alleged in the complaint.[11] Yet plaintiffs have produced no evidence that might reasonably support an inference that a conspiracy existed among any of these defendants.[12] Without so much

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[11] *E.g.* Caldwell Depo. at 117-21; Doerr Depo. at 142-48; Edwards Affid.; Edwards Depo. at 35-38; Goldberg Affid. ¶¶ 5, 6, 9, 10; Goldberg Depo. at 50, 53-55; Schroeder Affid.; Warfield Depo. at 100-101, 170-74; Weiss Affid. ¶ 4.

[12] Indeed, plaintiff Amis repeatedly admitted during his deposition that his allegations were based on "thirdhand information, word of mouth," and "hearsay." E.g. Amis Depo. at 22, 29, 37, 68, 103, 105, 146, 175. He also relied on conversations with the attorney who represented him in the unsuccessful malpractice action against Henderson, Franklin, Mr. T Rankin Terry. *E.g. id.* at 77, 96, 98, 101, 146, 173, 175-76, 178; *see Amey, Inc. v. Henderson, Franklin*, 367 So.2d at 634. Mr. Terry, in turn, testified to virtually no personal knowledge of any of the alleged agreements, e.g. Terry Depo. at 79, 133-34, and conceded that what knowledge he had derived from "rank speculation." *Id.* at 190.

as a single citation to the record, plaintiffs list in their memorandum twelve "evidentiary acts" upon which they rest their opposition to summary judgment. Only a few of these twelve involve the existence of a horizontal agreement.[13]

Plaintiffs "support" their claims of price fixing and "exchange of price information" by mentioning as "evidentiary acts" (1) the "periodic circulation of price lists including attorney's fee quotes among the several defendants," (2) the law firms' "use of the same or uniform methods for arriving at charges for the various services," (3) the bank's refusal to permit attorneys other than their own to represent borrowers, and (4) the creation by several Lee County attorneys of the defendant Gulf Abstract. Memorandum, August 17, 1982, at 10-11. Each will be discussed in turn.

The record reveals only two fee schedules to which plaintiffs might possibly refer: those promulgated by Gulf Abstract and other title insurance companies listing premiums for title insurance and fees for other services incidental to mortgage loan transactions; and certain formulae and fee lists provided by some of the firms to their respective bank clients to enable the bank to estimate its attorney's fee at the outset of a transaction. The claims in this case and the injury of which plaitniffs complain involve attorney's fees charged in connection with mortgage loans. Schedules of premiums charged by one or several title insurance companies doing business in the area are simply unrelated to the question whether the

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13 Others relate to plaintiffs' claims of tying and exclusive dealing or their claim of attempted monopolization.

fees charged by area attorneys for rendering title opinions were fixed according to a horizontal agreement, for nothing in the record suggests that title attorneys in the area conspired to fix their legal fees on the basis of these schedules of title insurance premiums. Similarly, the practice of certain Lee County law firms in letting their bank clients know what fee would likely be charged for rendering a title opinion in a particular transaction suggests nothing more than the unsurprising fact that purchasers who are to pay the bank's attorney's fee may be interested in an estimate of that fee. *See, e.g.*, Warfield depo. at 64-68; Schwartz Affid. (April 28, 1982).

Defendants have conceded for the purpose of their motions for summary judgment that the fees charged by Lee County attorneys for rendering title opinions were roughly similar.[14] Indeed, it is reasonable to assume that most lawyers in the Lee County area and elsewhere determine their fees by reference to the value of the property being sold. But mere parallel behavior, in the face of ubiquitous economic realities such as risk exposure, cannot possibly suport an inference that the firms colluded to fix their fees. *Theatre Enterprises, Inc. v. Paramount Film Distributing Co.*, 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954); *Southway*, 672 F.2d at 494; *Quality Auto Body, Inc. v. Allstate Insurance Co.*, 660 F.2d 1195, 1200-01 (7th Cir. 1981); *Weit v. Continental Illinois National Bank and Trust Co.*, 641 F.2d 457, 462-63 (7th Cir. 1981), *cert. denied*, — U.S. —, 102 S.Ct. 1610,

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[14] The record also reveals "parallel conduct" in that each bank defendant ordinarily used a particular law firm to handle its mortgage loan transactions. Such conduct is at worst untroubling. See section II(B), *supra*.

71 L.Ed.2d 847 (1982); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 207-09 (3d Cir. 1980); *Pan-Islamic*, 632 F.2d at 558-64.

Review of the record offers scarce suggestion that any of the bank defendants "refused" to permit their borrowers to use their own attorneys. Initially, it is unclear what importance such a refusal might have in an antitrust action brought by an erstwhile borrower.[15] Nevertheless, the only reasonable indication in the record that borrowers were somehow prevented from using their own lawyers is in the "chilling" effect of the bank's "requirement" that borrowers pay the fees of the bank's attorney; such a requirement might well discourage borrowers from retaining their own attorney in uncomplicated transactions.[16] But banks have every right to retain counsel of their choice and to negotiate transactions in a way that passes that cost on to the borrower. *See* section II (b), *supra*. That said, its only suggestion with any root in the record of a bank "refusing" to allow a borrower counsel of his own choice relates to the Deep Lagoon transaction, a complex deal in which Exchange lent over one million dollars. Exchange apparently refused to rely on title work done by T. Rankin Terry, choosing instead to rely on an "unusually qualified" member of the Allen, Knudsen firm. As noted above, Exchange had every right to choose its own counsel for its own protection in that and other transactions, especially in view of the borrower's

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15 *See* note 1, *supra*. *Cf. Foster*, 590 F.2d at 933.

16 *Foster* recognized the possibly chilling effect of such a requirement, 590 F.2d at 931, but considered it *de minimus*. *Id.* at 933.

continued right to "use whoever (sic) he chose for his own protection." Caldwell Depo. at 125. Plaintiffs' claim that this practice flowed from a horizontal agreement is without basis in the record.

Finally, the fact that a group of attorneys in Lee County incorporated Gulf Abstract in 1956 gives pause, but on reflection bears no weight in this analysis. Mr. Will J. Hayek, Jr., the first manager of Gulf Abstract, testified that lawyers in the area were having difficulty getting abstracts of title from existing companies quickly enough to enable them to render title opinions and close within a reasonable period of time. Title insurance was available far more quickly than the abstract necesasry to inform a title opinion, and the attorneys' real estate work was predictably slow as a result. They met this competition by forming Gulf Abstract, a closed corporation that would and did provide evidence of title in the form of an abstract upon which the attorney might then base his opinion. Gulf Abstract's services were available to anyone "willing to pay." *See* Hayek Depo. at 26-27. In 1973, Gulf Abstract began acting as agent, issuing title insurance on several major underwriters, but it has never issued title opinions or generated a fee schedule for such a service. Today Gulf Abstract continues to produce abstracts, issue title insurance policies, and provide other services incidental to mortgage loan transactions in competition with several other companies in the Fort Myers area. Attorneys in the area use Gulf Abstract's services; they also use those of its several competitors. Plaintiffs do not articulate, and this Court is at a loss to imagine, how the formation or continued operation of Gulf Abstract implicates it and the other defendants in a con-

spiracy either to fix the fees charged by attorneys for rendering title opinions or to monopolize "the practice of real estate legal services." Complaint ¶ 92.

Accordingly, upon review of the entire record, this Court concludes that it is wholly insufficient to support an inference that these defendants conspired either to fix or stabilize attorney's fees in the ways plaintiffs suggest or to monopolize the markets to which these plaintiffs allude.

D. *"The Practice of Law."*

Plaintiffs also claim that some or all of the defendants conspired in restraint of trade "without the express approval of the State of Florida, to cause the services of real estate title searching and describing and opinions to be included within the definition of 'the practice of law,' as recognized by the State of Florida." Complaint, count 7, ¶ 88.[17] Like most states, Florida has delimited the powers of title companies and other non-lawyers involved in real estate transactions. *E.g. The Florida Bar v. Howard,* 306 So.2d 515 (Fla. 1975); *The Florida Bar v. Columbia Title,* 197 So.2d 3 (Fla. 1967); *The Florida Bar v. McPhee,* 195 So.2d 552 (Fla. 1967). The Florida Supreme Court's decisions in that regard are pursuant to Article V, Section 15 of the Florida Constitution, and undoubtedly enjoy immunity within the rule of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 S.Ct. 315 (1943). Even if defendants' alleged activities might be said to come within the exception to *Parker* announced in *Goldfarb v. Virginia State Bar,* 421 U. S. 773, 788-92, 95 S.Ct.

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[17] This claim is cryptically entitled "Group Boycott."

2004, 2014-16, 44 L.Ed.2d 572 (1975), plaintiffs' claim in count seven must fail, for the record does not even suggest that any of these defendants participated in any way in the adoption of the challenged rules. Even if the record did contain such evidence, defendants' actions might well be immune from antitrsut attack under *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 602 (1972). The final flaw in plaintiffs' assertion of the claim in count seven is their complete lack of standing to challenge the Florida Supreme Court's decisions or the alleged activities of these defendants on antitrust grounds. *See Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1130-32 (5th Cir. 1975).

Defendants are entitled to summary judgment on this claim.

E. *The State Claims.*

Plaintiffs contend in count ten that the allegations of federal antitrust allegations in counts one through nine amount as well to a claim under the Florida Antitrust Act, Fla. Stat. ch. 542 (1981). The Court's disposition of plaintiffs' federal claims on the merits requires summary judgment on the merits of count ten. *Id.* §§ 542.20, 542.32.

In counts eleven and twelve, plaintiffs purport to state causes of action under "Florida Statuatory (sic) Law" and under "common law principles." So far as their thrust can be discerned from the complaint, these claims have been once litigated. *See Amey, Inc. v. Henderson, Franklin.*

Summary judgment is therefore appropriate on all of plaintiffs' state claims.

III. CONCLUSION.

For the reasons stated, the Court is of the opinion that each defendant's motion for summary judgment should be, and it is hereby GRANTED. The Clerk is directed to enter judgment accordingly. This case is DISMISSED.

IT IS SO ORDERED at Tampa, Florida this 25 day of April, 1983.

/s/ BEN KRENTZMAN
SENIOR U.S. DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3393

D.C. Docket No. 80-00088

AMEY, INC. and JOHN C. AMIS, JR.,

Plaintiffs-Appellants,

versus

GULF ABSTRACT & TITLE, INC., et al.,

Defendants-Appellees.

No. 83-3520

D.C. Docket No. 80 00088

AMEY, INC. and JOHN C. AMIS, JR.

Plaintiffs-Appellees,

versus

GULF ABSTRACT & TITLE, INC., et al.,

Defendants-Appellants.

Appeals from the United States District Court for the Middle District of Florida

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Before JOHNSON and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

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* Honorable Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees in case no. 83-3393; and defendants-appellants pay to plaintiffs-appellees in case no. 83-3520, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 29, 1985
For the Court: Spencer D. Mercer, Clerk

/s/ By: (illegible) .....
Deputy Clerk

ISSUED AS MANDATE: JUN 11 1985

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-3393

AMEY, INC. and JOHN C. AMIS, JR.,

Plaintiffs-Appellants,

versus

GULF ABSTRACT & TITLE, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(Filed May 30, 1985)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 19, 1985, 11 Cir., 198—, — F.2d —).
( )

Before JOHNSON and HATCHETT, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

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*Hon. Seybourn H. Lynne, U.S. District Judge for the Northern District of Alabama, sitting by designation.

rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-88-Civ-Ft.M-K

AMEY, INC. and JOHN C. AMIS, JR.,

Plaintiffs

vs

GULF ABSTRACT & TITLE, INC., et al

Defendants

ORDER

(Filed July 17, 1981)

There are three motions pending in this case. Defendants filed a motion on June 11, 1981 for an extension of time until July 15, 1981 in which to respond to plaintiff's first set of interrogatories, and this motion has now come to the Court's attention. In the meantime, on June 15, 1981, counsel for plaintiffs filed a motion for a ninety-day leave of absence due to injuries suffered in an airplane crash. On July 13, 1981, defendants filed a second motion for extension of time in which to respond to plaintiff's first set of interrogatories, this time requesting until September 14, 1981 in which to respond. The period requested is apparently intended to terminate at the end of the leave of absence requested by plaintiff's counsel.

The Court is of the opinion that defendant's first motion for extension of time, filed June 11, 1981, is MOOT.

The Court is further of the opinion that the motion for leave of absence should be, and it is, GRANTED. If

counsel for plaintiff is able to continue before the ninety days have expired, he is directed to so inform the Court and all counsel of record.

Finally, the Court is of the opinion that defendant's motion for an extension of time in which to respond to plaintiff's first set of interrogatories should be, and it is, GRANTED; provided, however, that if plaintiff's counsel is able to continue before the ninety-day period is over, the defendant shall respond to the interrogatories in question within ten days of receiving notice of the recovery of plaintiff's counsel.

IT IS SO ORDERED at Tampa, Florida, this 17 day of July, 1981.

/s/ BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 80-88 Civ Ft.M-K

AMEY, INC. and
JOHN C. AMIS, JR.,

Plaintiff,

vs.

GULF ABSTRACT & TITLE, INC., HENDERSON FRANKLIN, STARNES & HOLT, P.A., LEE COUNTY BANK, EXCHANGE BANK, ALLEN, KNUDSON, & SCHWARTZ, BARNETT BANK, GOLDGERG, RUBENSTEIN & BUCKLEY, P.A., FIRST NATIONAL BANK, ALDERMAN & TAMINOSIAN, P.A.,

Defendants.

ORDER

(Filed June 25, 1982)

The Court has for consideration plaintiffs' second motion to compel, filed June 9, 1982, and a motion to stay discovery filed by defendant Exchange Bank of Lee County on May 19, 1982. The motion to compel has drawn numerous responses from various defendants. On June 24, 1982, the Court heard argument on these motions and considered the status of the case.

Plaintiffs seek to compel the bank defendants to answer interrogatories asking for the details of a vast number of real estate transactions over a period of three

years, as limited. The most these data could possibly establish is the existence of parallel pricing and conduct on the part of certain defendants. Yet defendants concede parallel pricing and processing in the transactions that are the subject of this action. Under the circumstances, the Court DENIED plaintiffs' motion to compel. *See Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1190 (5th Cir. 1978).

Defendant Exchange's motion to stay discovery has merit. Just prior to the hearing, plaintiffs filed a notice that they intend to depose five witnesses on August 6, 1982. Aside from those depositions, the Court STAYED further discovery in this case pending determination of the various motions for summary judgment. Plaintiffs were directed to respond to the motions for summary judgment on or before August 17, 1982. Defendants may have until August 27, 1982 in which to file replies. A hearing on the motions for summary judgments is being separately noticed for August 30, 1982 at 9:30 a.m. in Tampa.

Finally, defendant Alderman & Taminosian, P.A., urged early consideration of its motion for summary judgment. The Court agrees that this motion should be considered as early as possible. Accordingly, plaintiffs were given fifteen days from the date of hearing in which to respond to Alderman's motion for summary judgment. Plaintiffs may advance the deposion of Frank Alderman III, presently set for August 6, 1982, if such can be arranged, in order to facilitate responses to Alderman & Taminosian's motion for summary judgment.

IT IS SO ORDERED at Tampa, Florida, on this 25 day of June, 1982.

/s/ BEN KRENTZMAN
CHIEF JUDGE